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THE COST AND AVAILABILITY OF LIABILITY INSURANCE FOR SMALL BUSINESS

HEARINGS

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

THE COST AND AVAILABILITY OF LIABILITY INSURANCE FOR SMALL BUSINESS

PART 3

GREEN BAY, WI—APRIL 7, 1986
EAU CLAIRE, WI—APRIL 14, 1986
WAUSAU, WI—MAY 30, 1986

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April 14, 1986:
Morning session 907
May 30, 1986:
Morning session 949

THE COST AND AVAILABILITY OF LIABILITY INSURANCE FOR SMALL BUSINESS

MONDAY, APRIL 7, 1986

U.S. SENATE,
COMMITTEE ON SMALL BUSINESS,
Green Bay, WI.

The committee met, pursuant to notice, at 10:30 a.m. in the council chambers, Green Bay City Hall, Green Bay, WI, Hon. Bob Kasten (acting chairman of the committee) presiding.

STATEMENT OF HON. BOB KASTEN, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KASTEN. Good morning. This hearing of the Senate Small Business Committee is called to order.

Today, the committee is focusing its attention of what has been described as the No. 1 consumer issue of our time, and clearly the No. 1 small business issue of today—the liability insurance crisis.

Liability insurance on all fronts is not only becoming more expensive, but more importantly, it is becoming more and more scarce. Even though I have been working for roughly 5½ years, since I was elected to the U.S. Senate, to put some sense into the current hodgepodge of varying State laws, Congress so far has been slow to recognize the depth of the liability crisis. Today, everyone from the small businessman to local governments faces the same problem: Finding affordable liability coverage.

Small businesses across the Nation are closing their doors because they cannot afford the liability insurance. Day care centers are facing astronomical increases in their insurance rates. Manufacturers of everything from woodworking equipment to hockey gear are halting production because of high liability insurance costs. Will County, IL, closed its forest preserves last month while it continues searching for a new liability insurance policy. Blue Lake, CA, had to shut down its skating rink, tennis courts, and parks. Thousands of cities and towns are forced to "Go Bare." They can't get liability insurance at all. So they go without.

Just in the paper today there was an article in USA Today about liability insurance, and the difficulties the people were having last week in Milwaukee and then through the State. Marquette University High School, unable to get liability insurance for its athletic programs, is in the process of cutting back, maybe even having to go without major athletic programs at the high school for the spring and for the fall. The fact is this issue is affecting everyone and it is affecting us here in Wisconsin.

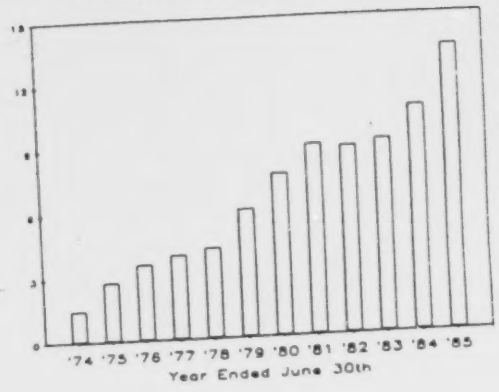
How did we get to where we are? There are a number of factors involved, but most experts agree that the huge damage settlements being awarded by our legal system over the past few years are the driving force behind the huge increases in liability insurance costs.

As you can see from the first chart, product liability suits alone have increased from 1,600 in 1974 to 13,500 in 1985. What we are talking about here from this point in 1974 to here where we are now at 13,500 suits, that is the rate of increase that we are seeing. And you see that the tremendous change, what we are talking about here is roughly a ninefold increase in this period of time in the individual liability suits.

The second chart shows that the number of $1 million verdicts is increased from 24 in 1974 to 400 in 1984. Twenty-four million dollars verdict here, over $400 million verdict here. What we are talking about there is a 1,600-percent increase in $1 million verdicts.

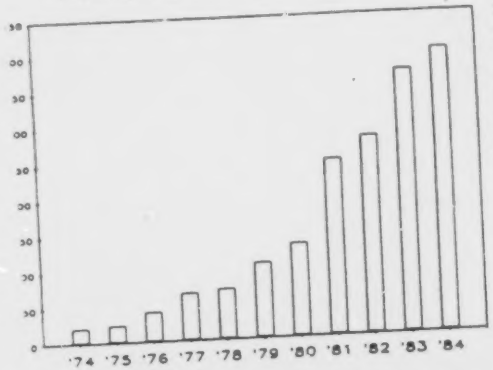
[The charts referred to follow:]

LITIGATION EXPLOSION



Product Liability Lawsuits (Thousands) Since 1974, the number of product liability lawsuits filed in U.S. District Courts has increased more than eight-fold. Source: Administrative Office of U.S. Courts.

NUMBER OF HUGE VERDICTS INCREASING



Million-Dollar Verdicts From 1974 to 1984, the number of million-dollar verdicts rose dramatically. Source: Jury Verdict Research, Inc., Solon, Ohio.

Senator KASTEN. In order to provide immediate relief for some of those affected by the current crisis, I have introduced a bill that amends the Product Liability Risk Retention Act of 1981 so that other groups, whether they be small businesses, local governments or whatever, can form collective purchasing groups and interstate risk-retention groups for general liability coverage. What we are saying is we allow individual groups to band together.

This legislation is supported by large numbers of people, including some of the people I referred to before. It would make it easier for groups to obtain favorable rates, favorable coverages or, if they needed to, to self-insure.

The bill was approved by the Senate Commerce Committee 2 weeks ago on a 14 to 2 vote showing that we are starting to develop the bipartisan consensus that is going to be needed in order to pass legislation that is going to make a difference on this national products liability effort.

That 14 to 2 vote was one of the—I believe a key signal to the fact that we would be getting to work together. The President has also recognized this issue and has announced his intention to throw the weight of the Presidency behind the reform movement. I certainly welcome his support because together we just might have a chance of solving this crisis.

Today we are here in Green Bay to get an even better perspective on how various groups are coping with the current problems in obtaining affordable and adequate liability insurance. We have representatives from diverse groups all suffering from the escalating proportions of this crisis.

Today's witnesses will be divided into two panels. Our first panel includes Mr. Floyd Dickinson and Mr. Frank Buethe of Green Bay.

Gentlemen, your entire written testimony will be included in the record. I would ask that each of you summarize and limit your remarks to no more than 10 minutes, less than that if possible so that there will be an opportunity for questions and also an opportunity for the next panel.

We are pleased to have you here, and our first witness is Mr. Dickinson, the owner of the Cliff Dweller Resort/Hotel in Sturgeon Bay; he is also the president of the Wisconsin Innkeepers Association.

Mr. Dickinson, we look forward to your testimony and thank you for testifying here today.

STATEMENT OF FLOYD DICKINSON, OWNER OF CLIFF DWELLERS RESORT/HOTEL, AND PRESIDENT OF THE WISCONSIN INNKEEPERS ASSOCIATION, ACCOMPANIED BY FRANK A. BUETHE, PRESIDENT AND OWNER OF ACME TREE SURGERY CO., INC.

Mr. DICKINSON. Well, it is my pleasure to be here. The Innkeepers Association has not gathered any statistics relating to the problems encountered with the insurance industry. We have been working to develop a group concept that is in its early stages of development and progress has ben slow.

Our personal business insurance problems began about 18 months ago when we were notified by our insurance carrier that we were no longer insured by their company. This was not only li-

ability, but the complete package, fire and theft and vandalism and loss of income. The reasons for dropping us were vague, but our local independent insurance agents informed us that they were no longer writing insurance for our kind of business.

Ironically, at the very next meeting of the board of directors of the Innkeepers Association, this same company was approaching the board with a concept of writing insurance for our innkeeping industry. Since for the last 20 years we have had insurance handled by a local independent insurance agency, they were able to find another carrier.

This same underwriting company, the same individual arrived to do a survey of our property unannounced in the middle of winter with 2 feet of snow closing in all the buildings and since we were closed in the winter, it was difficult. They certainly must have had a previous survey in their files somewhere. A phone call to the local agency could have assured them that we had no major changes to the property. We did in time, through the effort of our local agent, receive an insurance policy with a new company, yet to keep the premium cost within reason, we were forced to limit coverage to several of our major buildings only.

Our problems seemed to be resolved, yet 1 year later premiums increased 200 percent. This took place in spite of the fact that we had no claims. This drastic increase in premium cost will create cash flow problems for the resort industry as a whole and especially for the small seasonal businesses.

There is no way in this competitive business that rates can be increased for additional revenue, so in order to survive, overall insurance coverage is reduced in the hope that no major disaster will take place. Labor costs are reduced creating a never-ending cycle of decline.

Thank you.

[The prepared statement of Mr. Dickinson follows:]

April 2, 1986

Senator Robert Kasten
SH 110
Washington, D.C. 20510

attn: Steve Loucks

Gentleman of the Senate Small Business Committee: it is my pleasure to be here. I am Floyd Dickinson, owner-operator of the Cliff Dwellers Resort in Sturgeon Bay, Wisconsin. At this time I am also the President of the Wisconsin Innkeepers Association.

The Innkeepers Association has not gathered any statistics relating to the problems encountered with the insurance industry. We have been working to develope a group concept that is in its early stages of development-progress has at best been slow.

Our personal business insurance problems began about eighteen months ago when we were notified by our insurance carrier that we were no longer insured by their company. This was not only liability but the complete package - fire, theft, vandalism and loss of income. The reasons for dropping us were vague but our local independent insurance agent informed us that they were no longer writing insurance for our kind of business.

Ironically, at the very next meeting of the Board of Directors of the Innkeepers Association, this same company was approaching the Board with a proposal to write insurance for our innkeeping industry.

Since for the last twenty years we have insurance handled by a local independent insurance agency, they were able to find another carrier.

This same underwriting company, the same individual arrived to do a survey of our property.....unannounced, in the middle of winter with two feet of snow closing in all the buildings and we are closed in winter.

They certainly must have had our previous survey in their files somewhere. A phone call to the local agent could have assured them that there were no major changes to the property.

We did in time, through the efforts of our local agent receive an insurance policy with the new company...yet to keep the premium costs within reason, we were forced to limit coverage to several of our major buildings only.

Our problem seemed to be resolved, yet one year later, the premium increased two hundred percent!

This took place in spite of the fact that we had no claims.

This drastic increase in premium cost will create cash flow problems for the resort industry as a whole and especially for the small seasonal businesses. There is no way in this competitive business that rates can be increased for additional revenue. So in order to survive overall insurance coverage is reduced in the hope that no major disaster will take place. Labor costs are reduced mainly in maintenance. Services and amenities are reduced creating a never-ending cycle of decline.

I Thank You.

Floyd Dickinson

Floyd A. Dickinson

Senator KASTEN. Thank you very much. We are going to have an opportunity for questions, but before that I would like to now ask Mr. Buethe to go forward with his testimony and then we will have questions for both members of the panel. Mr. Buethe is the president of the Acme Tree Surgery Co. here in Green Bay. Mr. Buethe, we look forward to your testimony and thank you for appearing here today.

Mr. BUETHE. Thank you, Senator Kasten. Good morning, ladies and gentlemen. I am Frank Buethe and I own and operate a tree surgery company here in Green Bay. We contract to electric utilities, pipeline companies and government agencies to trim trees along electric power lines and to spray herbicides along the rights of way to control the growth of woody brush in these rights of way.

This past year we have seen our liability insurance premium rise to four times what it was the year before, and for that premium, we have had to accept limits one-half of what we carried the year before and accept deductibles which rose from $250 to $3,000.

In addition to that, we dropped our umbrella coverage because it became excessively expensive; and furthermore, in prior years, we used to be able to have the pollution exclusion eliminated from our policies, but now we must accept a standard pollution endorsement in all our policies. The effect of these increases in premium and reduced coverages has been significant.

First of all, we have had to accept a 28-percent reduction in profit because the insurance premiums have risen. We have not been able to pass that cost on to our customers.

Second, in our line of business, our customers require us to carry liability insurance. Heretofore, a $500,000 limit was acceptable. Today our customers are requiring limits of $1 to $10 million. And these limits are sometimes unobtainable, and of course, they are extremely expensive.

As a small business owner, a premium increase of this magnitude may well put us out of business. We compete against firms that are 10, 50, and sometimes 350 times our size. A larger company can spread the increased premium costs over larger units of production. We cannot do that.

Third, there is talk in the insurance industry today that we may not be able to obtain any pollution coverage whatsoever. I certainly could not go bare and carry no insurance whatsoever. If they do not offer pollution coverage, I frankly do not know what I will do.

Fourth, I face a dilemma in which my customers require liability protection in amounts which I may be unable to purchase at a reasonable cost and I may not be an acceptable bidder on contracts because I cannot purchase the required amounts of insurance.

Fifth, if insurance companies go to a claims-made basis for writing liability policies, there is a real question as to whether I can purchase insurance under those conditions. In many cases, the claims that we face in our business come many years later. I could not warrant to an insurance carrier that I know of no claims which may come about and it may be unwilling to assume a risk which may come years later to which it can assign no risk coefficient.

What can be done? I suggest the following remedies: I think we have to enact some type of legislation which will cap judgments for pain and suffering and punitive damages.

Second, I think legislation must be enacted which limits contingency fees.

Third, perhaps enacting legislation which will eliminate the joint and several liability standard in our tort system today may eliminate the deep pocket theory where those who have the money have to pay these tremendous liability awards.

Fourth, I think that the plaintiffs who bring the suits must prove the liability and prove that they themselves were not negligent. I also believe that the loser in a product liabilities suit should be made to pay the legal fees of those involved. And I believe that we must move toward a nationwide product liability standard to eliminate suits being brought across the United States in the States where it is easy to bring a suit against either manufacturer or anyone else.

All of this may take much longer than we can wait because the industry, I believe, is in a crisis situation today and it may mean that we need either the Federal or some kind of State governmental agency, providing liability insurance at reasonable costs to small as well as large businesses.

As an example, I own a small lawn care business which is being sued today for $2 million because the mechanic we hired in that lawn care business worked on a truck that was tipped over by one of our employees in the utility business. If that suit were to be successful for the plaintiff, it very well could put us out of business because a small business in the lawn care industry certainly does not have $2 million worth of assets.

As a small business owner and a Wisconsin delegate to the 1986 White House Conference on Small Business, I think we are in a crisis situation and something must be done not only to protect small businesses, but large businesses as well.

Thank you, Senator Kasten, for the opportunity to speak today and we will be happy to answer any questions you may have.

[The prepared statement of Mr. Buethe follows:]

Frank A. Buethe testimony
April 7, 1986 Green Bay, WI
before the Senate Small Business Committee

Senator Kasten, Ladies & Gentlemen:

I am Frank A. Buethe, President and owner of Acme Tree Surgery Co., Inc. Acme Tree Surgery is a small business headquartered in Green Bay which contracts with electric utilities, pipeline companies and governmental agencies to trim trees along electric power lines rights-of-way and apply herbicides along rights-of-way to prevent woody brush from growing in those rights-of-way or under the electric power lines.

In 1984-85 we were insured by our trade association insurance carrier. For 1985-86 that insurer stopped writing association insurance, not because of any particular risk associated with our association or its members, although we can be classified as a high risk business, but because it felt insuring associations was either too risky or unprofitable. For 1985-86 we were able to find general liability and automobile liability insurance through a local insurance broker.

Our 1985-86 liability insurance premium rose to over $30,000, four times what it was in 1984-85. For that premium we had to cut our limits in half from $1,000,000 to $500,000 and increase our deductible from $250 to $3000. In addition, we had to accept the insurance industry's standard pollution coverage endorsement instead of having the standard pollution exclusion eliminated from our policy, as we had been able to do before. In 1985-86 we dropped our umbrella coverage because the premium was too expensive.

The effect of these increases has been significant:

First, our total insurance cost has more than doubled directly reducing profits as a result. Our profits in 1985 were reduced 28% because of the increased insurance premiums which could not be passed on to customers and had to be absorbed from potential profits.

Second, our customers, the utility and pipeline companies, in the past required us to carry a limit of $500,000 in liability insurance. Today they require limits of $1,000,000 to $10,000,000! These limits are expensive and sometimes unattainable. In one case, I bid on a small four week $30,000 herbicide application job which required $10,000,000 liability coverage. The premium for that added $10,000 to the job. I did not get the job because I was not the low bidder.

Premium increases and costs like this ultimately will put Acme and many other small businesses out of business because our prices will not be competitive in the market place. I bid for work against firms 10, 50 & 350 times my size. Those companies self insure or spread their insurance costs over hundreds or thousands of units of production. I can do neither, therefore my insurance cost is extremely high relative to theirs and consequently so is my price. Ultimately I can not continue to compete against them and make a profit.

Third, those of us in the herbicide application business, as others who deal with potential pollutants, may not be able to purchase pollution coverage. Its cost may be prohibitive, but more likely, my sources tell me the insurance industry may not

offer pollution coverage at all next year. As a small business I would not be able to "go bare" and apply herbicides without insurance coverage--even if my customers would allow it! One large claim would put me out of business--as a corporation and personally.

Fourth, I may face the dilemma in which my customers require liability protection in amounts which I am unable to purchase at a reasonable cost (in which case my bid will not be competitive), or I will not be an acceptable bidder because I can not obtain the required amount of insurance as a contractor for the work. In either case I will be out of business.

Fifth, if, as a result of the present litigious climate, insurance companies change to a "claims made" basis for writing liability policies we in this industry may not be able to purchase liability coverage. Most claims made of us are made well after the occurrance, sometimes as much as a growing season and/or years later. In going to a claims made basis I doubt whether I could warrant that I know there are no existing potential claims. Could I get insurance coverage under those conditions? And even if I could purchase "tail coverage: could I afford it? We are in a unique business and underwriters may not be able to asses the risk of herbicide claims unknown now and their effects in the future. If so they may be unwilling to insure something they can not risk asses.

What can be done? I suggest the following remedies:

1. Enact legislation which will cap judgments for pain and suffering and punitive damages.

2. Enact legislation which will limit contingency fees so amounts sued for will not continue to rise which now allows plaintiff attorneys to collect larger and larger fees.

3. Enact legislation to eliminate joint and several liability thus preventing plaintiffs from collecting from the "deep pocket".

4. Enact legislation which makes the plaintiff prove strict liability and prove he was not negligent in his acts.

5. Enact legislation in which the loser to a product liability suit pays the legal fees of those involved.

6. Enact a nationwide product liability standard to eliminate suits being brought in the state with the most lienient liability laws.

7. And, because all of the above may take too long to put into place before this crisis engulfs us all the federal or state governments may have to provide liability insurance at reasonable costs if the private carriers will not.

As a small example of the crisis small businesses face today and how frightening the environment has become I would like to tell you what is happening to my firm.

In addition to Acme Tree Surgery I own a residential tree and lawn care corporation, Acme Professional Arborist Service. In October 1984 one of my employees working for Acme Tree Surgery

Company, the utility line clearance firm, tipped over the aerial lift truck he was operating. He fell out of the man basket and was injured. He has sued the aerial lift manufacturer, the manufacturer of the hydraulic mechanisms on the aerial lift and my other corporation, Acme Arborist Service, because the mechanic who works on our utility line clearance company's vehicles is an employee of Acme Arborist Service. He is suing for $2,000,000. Because my small residential corporation is a party to this suit solely because it employs the mechanic there is a very real danger it may be put out of business since the $2,000,000 suit exceeds the $1,000,000 liability limits which were in effect at the time of the accident by $1,000,000.

Not only might my small business be put out of business if the plaintiff were to prevail, but profits have been reduced when one considers the time and effort I have put into this suit rather than the business, and, worst of all, we all will pay for this suit through higher insurance premiums in the future.

As a small business owner and a Wisconsin delegate to the 1986 White House Conference on Small Business I appreciate this opportunity to present what I feel are important factors in a very threatening crisis for small and large businesses today. As a separate item I have included for you testimony I gave in December 1985 before Wisconsin's Property & Casualty Insurance Task Force hearing here in Green Bay.

Thank you. I will be happy to answer any questions you may have.

Frank A. Buethe
President, Acme Tree Surgery Co. Inc.
Remarks made before the
Property & Casualty Insurance Task Force
Green Bay, WI December 12, 1985

Acme Tree Surgery Co. Inc. is a small business engaged in line clearance & tree trimming for utilities and municipalities. We prune trees away from electrical transmission and distribution lines and apply herbicides along electric and pipeline utility companies to prevent the growth of weeds and woody brush up into electric lines or over pipeline rights-of-way. We also do herbicide applications along roads for municipal and county governments. In addition we do residential tree pruning and spraying and lawn application of herbicides to control weeds and insects. We employ approximately forty (40) people, are headquartered in Green Bay and operate generally in the northeast quadrant of the state.

I would like to discuss three topics with the task force:

1. What has happened to our insurance cost and coverage
2. What affect that has had on our business and what effect it will have in the near future
3. Some specific questions dealing with areas of concern and suggestions for possible solutions.

In 1984-85 Acme's liability and property damage premium was under $8,000: in 1985-86 it rose to over $30,000. In 1984-85 our commercial automobile premium was approximately $5500: in 1985-86 it rose to over $14,000. Those premium increases were four and three times our previous premiums.

For that increase in premium we received one half the coverage. In 1984-85 we carried $1,000,000 liability coverage: in 1985-86 for approximately four times the premium we could purchase only $500,000 of coverage. And to obtain that level of coverage we had to accept a $3000 deductible whereas before we carried only a $500 deductible.

The effect of these increases has been significant.

First, we are too small to self insure. We must purchase insurance through an insurance carrier.

Second, our customers require us to carry liability insurance and their requirements are going up. We do contract line clearance work for utilities. To bid on those contracts in the past required us to carry $500,000 worth of liability insurance. Their specifications now require $1,000,000 of coverage. In one case of a bid for less than ten (10) miles of herbicide application along county roads the county required $10,000,000 coverage. That amount is unheard of even in large construction projects. It added $10,000 to a small $30,000 job.

Third, there is talk in the insurance industry of not providing any pollution coverage. Now we are protected if pollution damage is sudden and accidental, but our policy has a pollution endorsement which states that coverage in any case is afforded only if the application of pesticides is lawful within all local, state and federal laws. The problem is that claims would probably come only if an application violated a statute or regulation, thus we feel there is really no pollution coverage now. Next year insurers may refuse even that type of endorsement and there will be no pollution coverage. In that case we all, as businesses and as a country will suffer, because no one, including manufacturers, haulers nor applicators will be able to obtain insurance for hazardous materials such as pesticides.

Fourth, we, as a small business contracting our services to customers, find ourselves in a dilemma: the customer is requiring ever high insurance limits in his specifications, but we are unable to purchase that required coverage at a reasonable cost which will make our bids competitive or are unable to purchase the coverage at all.

Several questions and solutions for the future must be addressed.

- If insurers go to a claims made basis for writing policies what happens when the insurer requires the purchaser to warrant he knows of no potential claims? In our business claims are generated after the occurrence: after a herbicide has leached off its target due to an unexpected heavy rain, or in the next growing season when a plant shows herbicide damage. How can we thus certify we know of no potential claims, and if we do certify and a claim arises will we be covered?

- I recommend action be taken on the Green Bay Area Chamber of Commerce recommendations and ideas presented today.

- There must be some realistic limit placed on liability and/or awards

- Insurance must be provided at a reasonable cost to those businesses which require liability protection--mandated if necessary.

- The system must equalize the risk in bringing lawsuits. The plaintiff must bear his share of risk in proceeding with a lawsuit rather than the defendant having to bear the entire risk to exonerate himself. If you lose as a plaintiff you should bear your legal costs just as a defendant must.

I will be happy to answer any questions the task force may have on these topics. Thank you.

Frank A. Buethe

kmb

Senator KASTEN. Mr. Buethe, thank you very much. As you know, the agenda is now being developed for the Small Business Conference, the White House Conference on Small Business and unlike 4, 5 years ago when you had the first White House Conference on Small Business and the effort was a tax incentive, the availability of capital, the other kinds of issues from all across the country with all the different meetings that have been put together including the one that we had here in Wisconsin, the issue that is emerging is kind of an overriding and maybe even overwhelming key issue to small business is this overall issue of liability insurance. I'm hoping that the small businesses will continue to force us to deal with this—these questions and problems.

You are right, and I'm not sure if we are going to be able to go all the way toward limiting contingency fees and all the suggestions you have made.

Clearly, it is important that we move in that direction. Mr. Dickinson, you have given your testimony, your personal experiences, which have been almost unbelievable in terms of insurance increases, and if I understood you correctly, you have had no claims during that time.

Am I correct?

Mr. DICKINSON. With this company, I have had no claims.

Senator KASTEN. So you had an increase of, what was it, 200 percent?

Mr. DICKINSON. 200.

Senator KASTEN. And no claims during that period of time. Now, since you are president of the Wisconsin Innkeepers Association, could you give us a sense of, is your experience typical or is your experience atypical and do you see this—the kind of change that you have seen in affecting your own business as the kind of problem that a number of people across the State are faced with?

Mr. DICKINSON. Oh, definitely. I am not alone in this. In our discussions in our board meeting of innkeepers, it comes up constantly. Someone has a horror story, and we have called them horror stories, and it doesn't really matter the size of the hotel or motel a lot of the time. I know one case where they were not able to get any insurance here. They went to Lloyd's of London in order to obtain the insurance and it became extremely expensive. The urgency has also been developed by the American Hotel/Motel Association, which is our national organization.

I have a letter here from March 12 which says, "We have urgent need for insurance initiative on the State-to-State basis. We will use the information to establish an action kit." By that they mean they would like to find out what each State may be doing to help the situation so they can put an action kit together to send out to all of us. "As you know, this current insurance issue is the most critical economic factor for all of our member organizations, small, medium or large." We at national, State, and city level must provide a response. This came out of our New York office.

Senator KASTEN. Let me see if I can attack the next problem. You have now got problems with insurance. Some of those insurance increases, even a 200-percent increase, may be able to be passed on to your consumers in the form of higher prices for meals, higher prices for rooms, whatever it might be. But more and more

people, as you are suggesting, are going without or are going to be forced to go without insurance completely.

Mr. DICKINSON. But there is——

Senator KASTEN. The tourism is now what, the No. 1 or No. 2 industry in most parts of Wisconsin and statewide it is either two or three in terms of total contribution to our economy. What does this mean for tourists? What does this mean for Door County? What does this mean for Rhinelander, Eagle River in terms of looking down the road 1, 2, or 3 years?

Mr. DICKINSON. Oh, I feel that it is another hazard that we should not have to face. We have competition by our neighboring States and we work hard to maintain a business and build a resort industry in the State, which I think we have done over the years, and I would hate to see this fall by the wayside now because of economic factors that we can't handle.

Senator KASTEN. Mr. Buethe, does the same kind of question you suggested that the—where the pollution control insurance is no longer available, what was the specific category?

Mr. BUETHE. Senator, it may not be available from any insurer for people in our business.

Senator KASTEN. So basically your actual coverage is decreased, your premiums have gone up four times. Do you think that there is going to be a time, the same question, where not only will pollution insurance not be available, but possibly other kinds of coverage not be available to people in your kind of business, and if so, where does that leave us in your kind of business?

I guess the second question is: Is your association, either on a State basis or a Federal basis, making any moves toward somehow putting together a risk insurance group?

Mr. BUETHE. The answer to the first question is yes, Senator. I believe that there are going to be other areas of high risk or even medium risk that will not be insured nationwide. Anybody in the pollution business, anybody in the toxic waste business or hazardous materials handling may not be insured. It appears that the insurance industry is getting out of anything that seems to them carries a large risk.

In our association, as a matter of fact, we were insured last year as an association and we had an excellent insurance program through the association in which coverages were a minimum of $1 million liability. There was no pollution exclusion in the policy. There was errors and omissions coverage. That insurer just got out of the business. It had nothing to do with our association as a risk. They just did not want to insure associations any longer. We were unable to find any other insurer that even had an interest in insuring us as an association and all the members were forced to go out as individuals and get their insurance for the 1985–86 season by themselves.

Senator KASTEN. As you were giving your testimony, I was struck by what you said about the pending lawsuit, the fact that this one lawsuit basically could put your entire business—which you have built up over how many years?

Mr. BUETHE. Approximately 40.

Senator KASTEN. Approximately 40 years—one lawsuit could put 40 years of work, investment, risk, a number of employees—one

lawsuit could knock you out of business. Does it seem to you to be unfair that there are limits and caps on the kind of insurance protection you can receive?

Mr. BUETHE. Yes. Right now there are no limits or caps on the kinds of claims that can be levied against you. Oh, I think it is grossly unfair. We can't buy the protection that we need, and yet in this litigious society, people can sue for whatever they care to.

It is my opinion that the same society where people sue for as much as they possibly can is aggravated by the fact that the contingency fee process just raises the minimum suit levels.

Obviously, I think that the higher the suit—and if your contingency fee is 30 percent, you certainly want to have a plaintiff sue for as high as he possibly can, and that just feeds upon itself.

If there is a $2 million suit, the next man says why shouldn't I get at least that and sues for $3 million. I think it is abominable the way that system perpetuates suits like that.

Senator KASTEN. I want to just ask a question of both of you—and I touched upon it earlier. As your insurance premiums go up, thus taking greater percentages of profitability away, have either of you had to charge—I am assuming the answer is going to be yes, but I want to get a sense of how you can pass on—maybe you can't—these kinds of increases to your customers?

Have you had to charge your customers more, for example, for removal of dead limbs for Dutch Elm or whatever the actual service that you may have performed?

Or, Mr. Dickinson, have you had to charge more on a per-night basis, per-mile basis? How are you dealing with the increase?

We will start with Mr. Buethe.

Mr. BUETHE. We face several problems in that area, Senator. One is in contract business. Under annual contract in which we have approved prices, if in the middle of the year your insurance premium greatly increases, and you are contracted at a much lower price, you have to absorb that increased premium cost. There is no opportunity to go back to your customer and say "well, now I want to change the contract because my insurance cost went up." You have already signed on the dotted line for a certain price.

We also bid contracts on a lump-sum basis, and just to give you some feel for how insurance premium increases affect us in that area, I had the opportunity to bid on a small herbicide application job for a county in the State of Wisconsin who required $10 million worth of insurance. I could get $10 million worth of liability coverage, but it cost me $10,000 for the period of time I would be doing that project. That particular lump-sum project was only worth $20,000 to $30,000. Adding $10,000 to cover my insurance costs made me the high bidder and I did not get the job.

That is the kind of thing these increased insurance premiums we have to pay are doing to us. We either absorb it or we don't get the work.

Senator KASTEN. Mr. Dickinson, can you respond to the same question? How are you in your own business, and all the people that you represent, the innkeepers across the State, dealing with these costs?

Mr. DICKINSON. I do not believe there is much opportunity for increased costs—I mean increasing rates in our business. It is very

competitive. And you may do a small percentage increase but then you lose some competitive abilities.

We at this point are not increasing rates. We are taking care of the increased costs but probably I am more fortunate in having a stable, debt-free operation. Anyone who has any kind of debt at this point in time to take care of and would have to increase rates, would lose patronage, and would probably be a loser in the long run.

So we shorten up somewhere else. I have less fire coverage than I should have on my building, by about, oh, I probably only have about half enough insurance to cover the total value of the building and you just take those chances. We have people in the business who are intending to go without some insurance.

I think there are attractions, for instance, and people with horses who are horseback riding where the insurance has always been high, but it has increased to a point where they try to take a chance now and operate without insurance, which I think is going to be catastrophic for them.

Senator KASTEN. On our next panel, which we are going to get to in just a moment, we have a representative of Irish Festivals, which is one of the festivals that goes on as part of the overall festivals around Summerfest in Milwaukee. I think he will touch on that because a number of people that he has been working with fall into this category.

There is a question as to whether the Sheboygan Brat Days are going to be able to continue. There is a great question as to whether the EAA, which is on our next panel, is going to be able to continue to have the kind of wonderful and economically successful events for Wisconsin.

I want to thank you both for your testimony and find that your entire testimony will appear in the record as if read.

This hearing is a part of a series of hearings which we are having with this special subcommittee of which I am the chairman, the Subcommittee on Entrepreneurship and Special Problems Facing Small Business.

There are special problems facing particularly small business today and it is the reason for that that we are having a series of hearings in Washington, DC, and also throughout Wisconsin within the next few weeks. There is going to be another hearing similar to this one in Eau Claire and it is our intention now to consider other hearings in the future in order so that people begin to understand the importance of this issue and also for us to act.

As I said, I am optomistic because we were able, on a 14-to-2 vote, to pass the risk retention amendment through the Commerce Committee. That means that we have got a good chance of passing it through the Senate, but that doesn't deal with the problems that Mr. Buethe is talking about or that you, Mr. Dickinson, are talking about.

It is one small part of the problem. And if we get at this idea of faultfinding, if we start to get at the problems of the costs, if we get into the transaction process and how consumers in the country are losing, then that is what we need to work with and we need some kind of a tort reform in that effort.

I thank you both for testifying here today. I look forward to continuing to do work with you, and thank you for appearing at this special hearing. Thank you very much.

Would the next group of witnesses come forward and take their place at the table. As the next group of witnesses are taking their places, I would like to state for the record that we also have testimony today that is being submitted for the record from a number of groups in the Green Bay area.

First of all, the Green Bay Chamber of Commerce has submitted testimony in support of products liability reform; the Wisconsin Towns Association, represented by Mr. Ed Krueger, is also submitting testimony; and the Wisconsin Oil Jobbers have submitted testimony on the overall problems of insurance and product liability.

Our first witness is Mr. Henry Ogrodzinski of the Experimental Aircraft Association. Henry, we are pleased to have you with us. I was pleased to be at the last EAA fly-in last summer, in which we talked to a number of Wisconsin residents and people across the country about the problems of products liability not only as it affects the EAA fly-in, but also the aircraft industry. We are particularly pleased to have you testifying here and we look forward to your testimony.

STATEMENT OF HENRY M. OGRODZINSKI, DIRECTOR OF CORPORATE COMMUNICATION, EXPERIMENTAL AIRCRAFT ASSOCIATION, ACCOMPANIED BY JOHN MAHER, CHAIRMAN OF THE BOARD OF IRISH FESTIVALS, INC.

Mr. OGRODZINSKI. Thank you very much, Senator Kasten. We sincerely appreciate your efforts in this area. We certainly commend you for all that you have accomplished in terms of the risk retention amendment and Senate bill 100, the promising effort there may lead to other legislation.

From the very beginning, I would like to make it very clear that EAA is a consumer group. We represent some 100,000 consumers who are interested in aviation and I am speaking today as a representative of that consumer organization.

It has been said in the past month by another major aviation magazine that EAA has been the source of more innovation in the past 10 years than any other area of civil aviation. This is because EAA has members who build their own aircraft, thereby they are able to take advantage of the cutting edge of technology.

You know, for many of these entrepreneurs, many of these small businesses are being forced out of the business simply because the insurance is either unaffordable or unavailable. Right here in the State of Wisconsin, down in Oshkosh, a young man by the name of John Monnett has designed and built his own airplane. He has a factory at Wittman Airfield. Unfortunately, last year he was faced with a dilemma: He could either go out of business entirely, or sell his business to another corporation. His decision was based upon the fact that he personally felt he would be a victim of an unwarranted or unreasonable liability suit. The daily nagging fear that he and his family were in financial jeopardy led him to sell his corporation.

Unfortunately, although the corporation is still in effect, it now belongs to a British entity and, of course, we would much prefer it to have been an American corporation.

As consumers, we have absolutely no quarrel with any justifiable liability suit; however, it has been our view that the scales of justice have been unfairly tilted. We have seen many factories sued even where we know they have not been negligent in the design or construction of an aircraft. And under the concept of joint and several liability, many factories have been targets of liability suits even when their connection to an accident or incident has been tenuous at best.

And as consumers, we certainly would not advocate any changes in the law which would jeopardize our ability to recover unreasonable damages from negligent suppliers or manufacturers, but we do feel that Americans have embarked on a lawsuit binge resulting in a totally unpredictable risk environment and all too often these suits have been, in our view, unjustifiable or even frivolous.

As you mentioned, the costs have been going up dramatically. These costs have been going up for the manufacturer of experimental aircraft and also for the commercial manufacturers which are primarily centered in Wichita. They are also going up for component manufacturers.

We recently spoke with a component manufacturer who has designed and built advanced electronic systems for aircraft. That system will never be seen anywhere except on the drawing board because he has been advised by his legal counsel and his accountant that he can not afford the additional liability insurance, and that by simply bringing this invention to the fore, he is breaking new ground which would lead to additional products liability exposure.

The annual EAA convention here in Wisconsin is the world's largest aviation event, and it is, we like to think, one of the most significant. Contributions brought into the State last year totaled some $54 million in terms of tourist expenditure.

The convention itself is facing insurance premiums this year which are increasingly expensive. Last year our insurance bill went up by some 300 percent—that was $151,000 more in premiums than we paid previously.

Unfortunately, we were required to assume five—receive $5 million less in coverage than we had previously enjoyed. The issue of products liability insurance, whether it is unavailable or unaffordable, is affecting many industries and associations throughout the United States, but it has particularly affected those of us who are involved in aviation.

In terms of solutions, we have looked at the General Aviation Tort Reform Act which is being offered by Congressman Dan Glickman. We think it goes a long way toward solving many of the problems faced by commercial manufacturers today. We also support the legislative efforts that you have been involved in and also support the efforts of Senator John Danforth of Missouri. We are encouraged that Congress is studying this issue at this point.

In closing my statement, I'd like to point out that aircraft sales are down, student starts are down, the number of licensed private pilots in the country is down. Recently many of us have read specu-

lation that the major manufacturers of the next decade may have names that would be unrecognizable to us today. I do not know if that in fact is true, but during our convention I do know—I have spoken with countless Japanese and German and Israeli and Spanish and British entities who want to bring light aircraft, light aircraft kits and light aircraft engines into this country.

Americans brought aviation to the world and I think it would be tragic if these Americans, who are struggling today to improve aviation, were not among those bright new names in aviation during the next decade.

Thank you, sir.

[The prepared statement of Mr. Ogrodzinski and letters from Messrs. Hamilton and Sontag follow:]

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STATEMENT OF

HENRY M. OGRODZINSKI, DIRECTOR OF CORPORATE COMMUNICATION

EXPERIMENTAL AIRCRAFT ASSOCIATION

ON

"THE IMPACT OF UNAVAILABLE OR UNAFFORDABLE LIABILITY INSURANCE ON AVIATION"

BEFORE THE SENATE SMALL BUSINESS COMMITTEE

April 7, 1986

Green Bay, Wisconsin

Good afternoon Senator Kasten and ladies and gentlemen of the Senate Small Business Committee. On behalf of Paul Poberezny, the Founder and President of the Experimental Aircraft Association, our members and nearly 700 EAA chapters around the world, I would like to thank you, for inviting EAA to participate in this important field hearing and for bringing all of us together here today to discuss this critical issue.

From the very beginning, I want to make it clear that EAA is a consumer group of over 100,000 members. As consumers, who happen to be aviation enthusiasts, we have a vital interest in the insurance availability and product liability crisis. A recent survey of EAA members shows that the majority of them have experienced higher liability insurance premiums...increases of as much as 400%. They are seriously concerned about product liability issues and they forsee this crisis dramatically affecting both the present and future of sport and general aviation. The survey indicated that most members feel that both the tort system and the insurance industry are primarily responsible for the crisis. Our members are overwhelming in favor of their organization taking action on this issue.

Last autumn, EAA brought together a diverse group of manufacturers and members-at-large to discuss this problem. At that point, we established a product liability task force and some of the facts and figures I will share with you today came out of those meetings. Since some of you here today may

not be familiar with the fact that aircraft kits and components are available to amateur builders, I'd like to take a moment to discuss the so-called homebuilt movement.

Many of our EAA members indulge in the unique hobby of building their own airplanes and restoring historic antique and classic aircraft for their own education and recreation. In fact, there are over 11,000 amateur-built, homebuilt, airplanes flying today. We estimate that between 20 and 30,000 of these aircraft are currently under construction. In terms of safety, these handcrafted, privately owned, aircraft are on par with their commercially manufactured brethren. However, the homebuilts clearly reflect the cutting edge of aeronautical technology. Many of them are faster, more fuel efficient and have greater range than comparable commercially built aircraft. In fact, many of the innovations in aviation today have come from the amateur built movement. I would like to quote what the world's most widely read aviation magazine, Flying, said in this month's issue, "These are the airplanes that chiefly draw new members, especially young ones, into the EAA, and these airplanes make it possible to say that EAA has been the source of more innovation in the last 10 years than any other area of civil aviation." "The EAA's members are collectively one of the major producers of civil aircraft in the United States." In our opinion many of the major manufacturers have been unable to take advantage of recent technological breakthroughs for fear of increasing their product liability exposure. For that reason, the utilization of emerging technology has largely been left to the American amateur aircraft builder. It is an extremely sad commentary on the state of our American aviation industry when one realizes that EAA members very nearly built as many airplanes last year, in their back yards, basements and garages as all of the commercial airplane manufacturers combined.

Burt Rutan has designed several Canard-type aircraft made entirely of composite materials, epoxy and fiberglass. In addition to these highly popular high-tech designs for the amateur aircraft builder, Rutan has designed a jet trainer for the United States Air Force, and the "Voyager" which is the only airplane potentially capable of flying around the world non-stop, unrefueled. He has also designed and built the beautiful new "Starship" which is being heralded by the Beachcraft Corporation as the beginning of a new era in aviation. Unfortunately, Burt Rutan, who contributed a great deal to the amateur-built aircraft field, announced last summer that he is leaving the homebuilt movement. He will no longer sell plans to amateur aircraft builders nor will he license suppliers. He has taken these drastic steps in order to limit his exposure to unreasonable and unwarranted product liability suits.

John Monnett established a factory to produce aircraft kits, just across Wittman Airfield from our own EAA Aviation Center in Oshkosh. The high technology kits which he produced, were of his own design. Those airplanes have proven to be efficient to build, they fly well and they are quite attractive. Unfortunately, Monnett was recently faced with a dilemma; either close the doors and shut down the factory...or...find a buyer for his business. He told me that the most important factor in his decision was the unaffordable product liability insurance premiums and the daily nagging fear that he and his family would be targets of an unwarranted and unreasonable liability suit. For that reason, he sold his high-tech company. <u>It is now part of a British corporation</u>.

Many of the designers and manufacturers of amateur-built aircraft kits are facing the same dilemma.

The kit manufacturers we have talked with and the consumers we represent have absolutely no quarrel with justifiable liability suits. As I wrote in our magazine last year, "Ours must be the voice of reason and all parties must be treated fairly. Anyone who has been injured by negligence must be free to sue that manufacturer or supplier and to recover reasonable damages. In straightening out the costly liability nightmare, we must not infringe upon the ligitimate rights of either consumers or producers." However, it is our view that the scales of justice have been unfairly tilted. We have seen manufacturers sued even when they have not been negligent in the design or construction of an aircraft. Under the concept of joint and several liability, manufacturers have been targets of liability suits even when their connection to an accident or incident has been tenuous at best. Manufacturers are concerned about enormous punitive damage awards. They clearly, and we believe correctly, point out that they should not be required to pay punitive damages when the aircraft they design and build meet or exceed all required federal standards.

We, as consumers, would certainly not advocate changes in the law which would jeopardize our ability to recover reasonable damages from a negligent manufacturer or supplier. But, Americans have embarked upon a law suit binge resulting in a totally unpredictable risk environment. All to often, these lawsuits have been, in our view, unjustifiable or even frivolous. For instance, I know of a biplane manufacturer who is being sued as the result of a mid-air collision. The plaintiff is claiming that the only reason he was involved in the accident is because the airplane was improperly designed. It is his claim that the lower wing blocked his vision and was responsible for the accident. Biplanes, by definition, have always had two wings. Any reasonable builder, buyer or pilot of a biplane ought to

recognize and understand the limitations of his aircraft. I don't believe the manufacturer ought to be blamed for the pilot's error.

One of the most respected manufacturers in the entire amateur-aircraft building movement is, for all intents and purposes, on the ropes. He has performed an in-depth audit of his products and processes and has found that 30% of the price of his aircraft kit is directly related to product liability insurance premiums. Thirty cents out of every dollar the consumer spends on this particular aircraft kit goes directly into product liability insurance premiums. From the viewpoint of the consumer, that is thirty hard earned cents that are being spent without receiving anything of real value in return. Today, this manufacturer's insurance company is demanding a product liability insurance premium of approximately $700,000. That is roughly 2 1/2 times his annual profit. By the way, that coverage is only for 5 million dollars. Last year, the same manufacturer was able to obtain $25 million dollars of coverage for a $167,000 premium. One need not be an accountant to realize that this manufacturer is in deep trouble in spite of the fact that his product has been universally acclaimed by both the consumers who have purchased and built the aircraft and by aviation authorities who have become familiar with it.

I am well acquainted with another designer who has developed a new and different wing configuration for an existing aircraft. His design, which is highly practical, would result in major increases in both speed and fuel economy. But, this design, like several others we have heard of recently, will never progress beyond the draftsman's board. The reason is both simple and ridiculous. If the improved wing becomes a reality, it would, in effect, prove that the earlier wing was defective. If it was not defective, why

change it with an improvement? Obviously, the manufacturer fears that taking advantage of state-of-the-art technology will result in greater productliability exposure.

I recently spoke with a component manufacturer who has designed and built the prototype of a new and improved high technology electronic system for aviation applications. If you want to see the prototype you will need to go to his workshop, because you will never see it anywhere else. He has been advised by his legal counsel and by his accountants that A) he cannot afford the additional insurance and B) that this system breaks new ground and therefore will result in greater product liability exposure. By the way, this same component manufacturer has been sued several times simply because his components have been on board an aircraft which has been involved in an incident or accident. These suits were filed in spite of the fact that his product clearly had nothing whatever to do with the accidents. Eventually, this was proven in court...but only after an enormous outlay of cash in order to defend himself from an unwarranted suit. Large manufacturers can afford legal departments. Unfortunately, some of the smaller ones are almost being literally sued out of business.

Last week an aircraft kit manufacturer told us that his carburetor supplier had recently decided to quit providing him with carburetors. It was parent company's legal department which prompted the decision. It was felt that the aviation application of the carburetor was a product liability exposure that the corporation could do without. I'd like to stress, again, that amateur-built aircraft are statistically no more dangerous than any other light aircraft. These are aircraft that take any average of 5

to 6 years to build...aircraft that demand all of the love, dedication and devotion that the builder can put into them. I'd like to remind you that the word amateur comes from the latin root "amo"... to love. Amateur aircraft builders love what they are doing and have justifiable pride in their high standards and excellent craftsmenship.

We, as consumers, are very concerned about the availability of products we require today and the innovative products we shall need in the future. We fear that the wide range of products may not be available because the manufacturers may be forced out of business because of the high expense of or the lack of availability of product liability insurance. This crisis extends to the basic materials used in aviation applications. Recently, in the course of a routine inspection, some minor corrosion was found in the tail of a B-17 Flying Fortress owned by the non-profit EAA Aviation Foundation. This rare aircraft is part of a flying museum which is flown to festivals and airshows around the country. For many Americans, this is the only opportunity they ever have to see and hear part of their aviation heritage in the sky.

In order to rectify the problem with the B-17, it was necessary to obtain several large sheets of aircraft quality aluminum. EAA's purchase order was initially rejected by a major supplier because they did not want to take the liability risk of having their product utilized in an aeronautical application. One kit manufacturer was only half facetious when he told me that "Next year, they may expect us to mine our own bauxite."

The annual EAA International Fly-In Convention and Sport Aviation Exhibition is one of the world's largest and most significant aviation events. Last

year, well over 750,000 aviation entusiasts from every state in the union and 66 different foreign countries attended the convention. Over 15,000 aircraft flew into the convention and accounted for over 64,000 landings and take-offs. That's more than 4 times busier than Chicago O'Hare International Airport. In terms of aircraft, the 1985 EAA Convention attracted everything from the world's smallest twin-engined homebuilt aircraft to the supersonic British Airways Concorde. The primary purpose of the EAA Convention is to provide a focal point for the exchange of information and education in an appropriate setting. Our EAA Aviation Foundation sponsors over 500 NON-stop forums, seminars and workshops on every aspect of aviation. During last year's convention, it became very clear that aviation has been exporting jobs. Nation's which are not affected by our product liability crisis are utilizing American technology, are utilizing modern high-tech components and materials and they are designing and building light aircraft that may come back to haunt us one day soon. At our convention, I spoke with business representatives from Great Britain, France, Italy, Spain, Germany, Japan and Israel...they were all interested in exporting light aircraft, light aircraft kits and light aircraft engines to the United States.

By the way, our EAA convention is one of the areas which has been affected by today's liability and insurance crisis. Although the EAA convention has had a very good safety record and is renowned for its extremely efficient organization, our insurance premiums for the 8 day event were increased by some 300% in one year. In spite of this outrageous increase of $150,000 more, we were forced to accept $5 million dollars less liability coverage than we previously enjoyed. We were told, by our insurers, that the premium increase had nothing whatever to do with the event itself...we were told that we were

paying the price for unrestrained and unreasonable liability suits across the nation. It was a "take it or leave it" situation. Our insurance coordinator is currently deeply involved in insuring our 1986 Convention. For instance he will be speaking to Lloyd's of London, this month. We are confident we will obtain coverage-but we shudder to think of the cost.

EAA chapters around the country are the prime organizers of aviation events in this nation. These grassroots efforts by dedicated aviation enthusiasts bring the importance of aviation into the lives of countless Americans. However, many of these fly-ins, conventions, breakfast meetings, service club events, airshows, chapter meetings, and educational opportunities were cancelled last year because of unavailable or unaffordable liability insurance. Because of tne very negative effect this crisis has had on us, we have established a new executive position at EAA Headquarters...that of professional insurance counselor. We have been very fortunate to obtain the services of Harry Hanisch as our insurance coordinator. Harry, who has had a long, successful and illustrious career in insurance is also a longtime EAA member and volunteer. With his understanding of the aviation field and the business of the insurance industry, he has been able to make a significant contribution to EAA and its chapters in helping us fulfill our insurance needs.

For well over a year, EAA has looked at this critical issue. I am the chairman of our in-house study group. We have organized a task force of manufacturers and users. We have prepared a series of in-depth articles on this crisis which we have published in our flagship publication, SPORT AVIATION. We have surveyed our members. We have had the privilege of testifying before the House Subcommitte on Transportation, Aviation and Materials and the State of Wisconsin Product Liability Insurance Task Force. The consensus is inescapable. While many feel that the insurance industry

must be investigated and must be more closely regulated, the majority of all involved in this situation feel that tort reform is clearly necessary as part of the overall solution to the liability problem. EAA has urged its members and all aviation enthusiasts to contact their elected representatives about this critical issue. We have urged our elected officials to openly debate the concept of federal uniform product liability legislation, so that we may all consider the ramifications of changing the laws which we feel are both unreasonable and unrealistic. As I said earlier, EAA's decision to become a proponent of tort reform was neither hasty, nor was it made it a vacuum. It was based upon the soundest input we could gather. Once our decision was made we became involved with other organizations which had begun mounting their own efforts to curb product liability costs, including the General Aviation Manufacturers Association which has been instrumental in bringing the viewpoints of both consumers and manufacturers to the attention of Congress and which was largely responsible for the congressional hearing on the subject.

We have studied the "General Aviation Tort Reform Act" being offered by Congressmen Dan Glickman and Bob Carr and feel that it goes a long way to solving many of the problems faced by commercial manufacturers today. Although the bill does not yet contain any provisions for amateur-built aircraft, EAA supports the bill and hopes that EAA members will encourage their congressmen to co-sponsor the act. We also strongly support the legislative efforts of Senator John Danforth of Missouri and Senator Bob Kasten of Wisconsin. We've been very encouraged by the fact that the Congress is considering tort reform.

In closing, I would remind you all that aircraft sales are down...that new student starts are down...that the number of licensed private pilots is down. The bottom line of this debate is whether or not the American General Aviation industry will survive. I think all of us have recently read speculations in some aviation magazines that in the next decade, the major manufacturers of aircraft may have names that are unrecognizable today I don't know if that's true. I would remind you ladies and gentlemen of the very interested foreign representatives I have met at our convention, and of the business meetings I have attended in the United States involving German and Japanese manufacturing concerns. America gave aviation to the world. Wouldn't it be tragic if there were no Americans among those new names in aviation.

August 1985

LIABILITY

AVIATION WILL SURVIVE . . . BUT ONLY IF WE ACT NOW

By Henry M. Ogrodzinski

The present chaos in the way liability claims are handled within the legal system is the most dangerous threat facing the aviation community today. In fact, we will either unite behind federal legislation to reform liability laws or personal aviation, as we have known it, will cease to exist. Obviously, we must act, and act now, while there is still time to stem the tide of incredible liability suits and increasingly unaffordable liability insurance.

If changes aren't made, airplane manufacturers, aircraft kit designers and manufacturers and component manufacturers could all be forced out of business. The skyrocketing insurance premiums could possibly even lead to changes in the world's greatest aviation event, the EAA Oshkosh Convention. EAA Headquarters has already encountered great difficulty in finding and obtaining liability insurance for EAA Chapter fly-in activities. During the past 90 days, EAA's Headquarters staff has been in close contact with many Chapter presidents and officers on this critical matter. In the future, every time someone takes an aircraft out of a hangar, they could be jeopardizing their own home, automobile, family savings and future. Why? Because we won't be able to find liability insurance . . . or we won't be able to afford it!

Some Examples

A major kit designer and producer tells us that 30% of the price of a new kit built biplane pays for liability insurance.

Beechcraft recently lost a $2.5 million suit arising from the crash of a 1958 Travel Air. The jury found that Beech had negligently designed and built the airplane in spite of the fact that FAA twice tested the airplane and found it in compliance with Federal Aviation Regulations!

Another manufacturer says product liability costs have made building small airplanes too expensive! Cessna attributes $17,000 of the price of a 152 to legal expenses.

Although our EAA Convention has an excellent track record for both safety and organization, this year's insurance premium for the EAA Convention has jumped by over 300%. This year, over $150,000 **more** in insurance premiums must be paid out of registration fees for **less** insurance coverage at this year's Convention.

The problem is universal. We have heard similar horror stories from the folks who produce ethnic festivals, manufacture motorcycle helmets, fabricate sporting goods and manage day care centers.

The liability insurance industry is in chaos. Over the past several years, legal actions have resulted in incredibly high settlements paid by insurance companies in liability suits affecting a wide range of industries. The insurance companies are also experiencing a very low return on the investment of each premium dollar. As a result, many insurance companies are facing cash flow problems, while at the same time they are extremely wary of underwriting any activity which could lead to a large liability suit and, of course, affect their financial stability. **All** of us are paying **more** premium dollars for **less** insurance coverage. The situation seems to get worse every day.

What Went Wrong?

In the opinion of at least one major newspaper, "America is literally suing itself out of business." Another recreational activity magazine says, "These incredible costs exist because of a 'suit happy' mentality in our society and mercenary plaintiff's attorneys." It has been noted that contingency fees are **outlawed** as champerty in most of the civilized nations outside of the United States.

Others say that the insurance companies themselves are at fault by settling out of court. Critics also say that insurance companies are no longer playing fair with their clients.

Some have said that the "average American" is responsible for this nightmare. We are happy to jump on the litigation merry-go-round at the slightest provocation. We, apparently, refuse to take responsibility for our own actions and blame manufacturers and suppliers for our own negligence. Did you know that an estimated 110,000 product liability suits are filed every year? The insurance industry calculates that it paid out some $400 million in product liability claims in 1981 alone. In addition to climbing insurance premiums, manufacturers and their customers face billions of dollars in additional costs from attorney's fees and nuisance suits. In some states, people are permitted to collect awards even though the manufacturer was no way negligent. In other states, improving a product such as an airplane can be used in court as evidence that the earlier version of the product was unsafe.

Let's Do Something Now!!

Although we still have time to correct the situation, it is frankly too late to point fingers. There's enough blame to go around for everyone. The point is, we must solve this problem before it kills sport aviation and strangles the entrepreneurial spirits of Americans. It is essential that we solve this problem without causing any more injustice. **Ours must be the voice of reason and all parties must be treated fairly. Anyone who has been injured by negligence must be free to sue that manufacturer or supplier and to recover reasonable damages.** In straightening out the costly liability mishmash, we must not infringe upon the legitimate rights of consumers or producers.

What Can We Do?

We must tell our Congressmen and Senators that we are fed up and that we are not going to take any more!

We must unite with a full spectrum of individuals and groups who are also appalled by the current liability jungle and impress upon our elected officials that we want a **uniform federal liability law**. Our representatives in Washington must step up to their responsibilities. For more information on this critically important subject, read Paul Poberezny's "Homebuilder's Corner" and David Scott's "Washington Report" in this issue. During the 1985 EAA Convention, Paul will be making an important policy statement regarding the critical current liability situation at the Sunday evening State of the Association meeting. If you are at the Convention, be sure to attend this extremely important meeting. Using EAA's good offices, its credibility and its reputation, we shall bring this situation to the attention of the news media.

It is up to us, the EAA members, to lead the fight in this battle. We must act now and we must pull together. We can't wait for "the other guy" to do something. We **are** the other guy. We must encourage others to support our efforts and EAA must speak with all of its 100,000 voices or it will not be heard.

Nov 85

by Henry M. Ogrodzinski, Director of Corporate Communication

CONSUMERS–INSURANCE–LIABILITY: A PROGRESS REPORT

EAA searches for root causes of the insurance/liability crisis with aid of members... meanwhile, more consumers feel the pinch

In the August issue of SPORT AVIATION we said that the way liability claims are handled within the legal system and the accompanying increases in insurance premiums as well as the unavailability of insurance for many businesses all add up to the most dangerous threat facing the American aviation community today. Since then, the devastating affects of these increasing costs have been felt by consumers across the country.

In some municipalities, bus riders face stiff fare increases as bus companies find it impossible to obtain affordable liability insurance. Smaller communities find that they can no longer afford the staggering increases in liability insurance premiums and wonder if police and fire services will have to be curtailed in order to limit liability exposure. Senior citizens have petitioned some state governments to put a cap on medical malpractice awards. They say that the increases in physician's insurance premiums are being passed on to those who most need medical care but can least afford the increased costs — the poor and the elderly. In Milwaukee, ethnic festivals may have to be cancelled because sponsors are unable to afford the incredibly expensive premiums demanded by insurance companies.

This growing national consumer awareness has been stimulated by many factors. Among them are EAA's efforts to focus the attention of members and the media on the problems of insurance and product liability. At the 1985 EAA Convention, President Paul Poberezny, Convention Chairman Tom Poberezny and well known author Martin Caidin all discussed the issues with EAA members, the aviation press and the mass media. Paul Poberzny said, "The way liability claims are handled within the legal system is affecting every industry, every activity and every life in America. We are all paying more of our hard earned dollars for less insurance. We are also paying more for the products which have had their prices artificially increased by rising insurance costs."

Wisconsin Senator Robert Kasten also attended this year's Convention to exchange views on the situation with Paul, Tom and the EAA staff. He briefed them on his sponsorship of uniform federal liability legislation and was, in turn, told about the problems facing the sport and general aviation community.

Ironically, as the subject was being discussed, Burt Rutan announced that his highly popular designs will no longer be sold and John Monnett announced that he had sold his entire business to a British corporation. Both designers said that their prime reason for leaving the field was the fear of unreasonable product liability suits.

Since the current insurance woes and product liability concerns will have a profound affect on the amateur-built experimental aircraft movement, a special EAA Planning Committee has been established to gather and study information from all perspectives, meet with other concerned groups and individuals of varying viewpoints, and to evaluate the courses of action available to us. We have, for example, attended meetings called by the General Aviation Manufacturers Association (GAMA) in order to view the problem from the manufacturers perspective. EAA has also met with key congressional and senatorial staff members who have briefed us on the history of product liability reform, the present political climate, legislation currently in draft stages and the potential for uniform federal legislation in the future. We have consulted with groups, such as the Product Liability Alliance, which are currently lobbying for changes in how liability suits are handled by the judicial and legal systems. We are fortunate to have many EAA members who are also members of the legal profession, ranging from trial lawyers to corporate counsel. They have been very helpful in sharing their ideas, from various perspectives, with us.

Through these efforts, we have gathered some interesting information. According to GAMA, insurance costs for airplane manufacturers amounted to $135 million last year. That averages out to about $65,000 per airplane produced last year. A recent Rand Corporation study of liability suits involving the asbestos industry indicates that for every $1.00 paid to injured persons, about 95 cents is paid to a defense attorney and 64 cents is paid to a plaintiffs attorney. Obviously, the victims are receiving only 39% of all the money that is being poured into that system.

This inequitable system, which has resulted in excessive or unreasonable claims and awards, questionable insurance practices and unwarranted suits, is one of the major reasons that insurance is now either unobtainable or unaffordable for many of us. We have encountered one very vocal group which disputes the fact that the present situation is unfair to both consumers and manufacturers and that it represents an enormous waste of resources. The Association of Trial Lawyers of America states, "We stand 60,000 strong and are virtually opposed to any reform of product liability law through the legislature." The group is raising funds to defeat any challenge to the status quo.

If there is to be an effective remedy, all parties must be treated fairly and EAA must maintain its voice of reason. Anyone who has been injured due to negligence must be free to sue the manufacturer or supplier involved to recover reasonable damages. Any **reform must encourage safety, compensate victims, and efficiently reorganize the system.** We must be careful to attack the root causes of the problem rather than flailing ineffectively against its symptoms.

In these efforts, your EAA HQ staff is in the unique position of being both leaders and followers. We have been guided by your overwhelming support in the form of letters and phone calls. Many of the most important contacts that we have developed have been the result of the "talent" available in the EAA membership itself. For instance, one of the world's largest retail corporations has encountered many of the same problems facing the aviation community. Fortunately, an EAA member who is an executive at that corporation has volunteered his time, expertise and experience to your Headquarters staff. EAA's most important resource is the combined talents and skills of its membership. EAA's policies and positions in the insurance and product liability areas will be based upon your input. Your Headquarters staff will act upon your recommendations as coordinators and facilitators.

A formal, random survey has been mailed to a statistically determined group of EAA members. Members are being polled on whether they have been adversely affected by the present insurance-liability system, what they believe the causes of the current crisis are, and what they believe EAA should do about the problems facing the aviation community.

In the near future, we will publish the results of that survey and tell you, the EAA member, what you can do about what many of us consider to be an irrational system. Until then, your HQ staff will continue its efforts. We will, for example, be attending a formal congressional hearing on the impact that unreasonable product liability suits have had on emerging aviation technology. All EAA members *are* encouraged to learn as much as they can about the current insurance and liability crisis from all the sources at their disposal. The future lies in the hands of all EAA members.

Jul. 86

by Henry M. Ogrodzinski, Director of Corporate Communications

LIABILITY CRISIS . . . WHAT YOU CAN DO

The current liability crisis is having a profoundly negative effect on every business, every industry, every municipality and every consumer in America. In this, our fourth article on the subject, we will look at what the individual EAA member can do to protect his or her rights as a consumer.

The fact that liability insurance is rapidly becoming unavailable or unaffordable is a clear and present danger to the freedom of personal flight enjoyed and encouraged by EAA members. As we have seen:

- Aircraft designers are already leaving the experimental/amateur-built movement in fear of unjust and unfounded liability suits.
- Some experimental/amateur-built kit manufacturers have already left the market because of the expense or unavailability of liability insurance.
- Insurance and liability costs have driven the price of commercially manufactured aircraft beyond the reach of ordinary Americans.
- Commercially manufactured aircraft engines are unaffordable because of the unbelievably high insurance premiums paid by manufacturers.
- The aircraft components used by EAA members are becoming increasingly expensive due to the unreasonable insurance costs faced by small suppliers and vendors.
- Certain types of aviation components or accessories are already disappearing from the market due to the manufacturer's or supplier's fear of product liability exposure.
- Many EAA Chapter events and fly-ins have either been modified or cancelled because the organizers cannot afford the outrageous increases in liability insurance premiums.
- The EAA Technical Counselor program has been modified in order to clearly protect the EAA Technical Counselor and his Chapter from unwarranted liability suits.
- As liability insurance becomes increasingly more expensive and less available, we aviation enthusiasts have been forced to change our lifestyles and the way we regard our activities because we now live in justifiable fear of unwarranted and frivolous lawsuits.

This sad state of affairs has two root causes. First of all, we must look at the insurance industry itself as a major contributing factor to the current situation. Some companies intentionally extended the coverages of policies while underestimating risks and overestimating the percentage of interest on their investment dollars. These mistakes were compounded by the companies which resorted to "cash flow underwriting" which was probably the least prudent course of action under the circumstances. The term "cash flow underwriting" refers to those companies which assumed imprudent risks for low premiums in an effort to keep the dollars flowing in while the company was experiencing heavy losses as a result of large damage awards and low returns on their investments. To some extent, the outrageous premium increases we consumers are now experiencing are the penalty for the poor judgment of some insurance company executives in

"For instance, many feel that the concept of 'joint and several liability' is grossly unfair."

the past. These companies must bear the consquences of their actions and EAA believes that state and federal authorities must do what they can to prevent a recurrence of these unsound practices. State insurance commissions, in particular, must be stronger and more vigilant.

Secondly, and most importantly, the way liability claims are handled within our legal system is the primary cause for the chaos in the insurance industry today. Americans have embarked upon a lawsuit binge resulting in a totally unpredictable "risk" environment. All too often, these lawsuits have been unjustifiable . . . or even frivolous. Nevertheless, these less than sensible lawsuits which have flooded the court system have often resulted in incredibly large awards by over generous courts and juries. The lawsuits and the awards have been made possible by a tort system that has gone out of control. Even if the insurance companies were managed by knights in shining armor, this inequitable system, which has resulted in unreasonable suits and awards, could still result in unavailable or unaffordable insurance. EAA believes that any reasonable solution to our present problems includes basic tort reform.

The question of "general liability" is probably best dealt with by state legislators because of its "local" nature. However, the issue of "product liability", because it involves "interstate commerce", is best dealt with at the federal level.

Because of the often conflicting patchwork of state and local product liability laws and because of the latitude afforded courts and juries, the only tort reform that will have an overall beneficial effect on the system is uniform federal product liability legislation. Changes at the federal level will bring uniformity to a highly diverse body of state and local regulations and interpretations while bringing reason and logic back into the legal system. Let's look at some of the inequities permitted by the present tort system.

For instance, many feel that the concept of "joint and several liability" is grossly unfair. Consider, if you will, the following hypothetical case. EAA members A, B and C are all involved in the same accident which results in the injury of an innocent bystander. EAA member A is judged 80% responsible for the accident. He has no liability insurance. EAA member B is judged 19% responsible for the accident and has insurance policies amounting to $100,000. EAA member C is judged to be only 1% responsible for the accident but carries liability insurance coverage of $6 million. Under the present system all three EAA members will probably be sued for a total of $6 million. However, because EAA member C has the "deep pockets" containing $6 million worth of coverage, member C could wind up paying far more than members A or B, in spite of the fact that member C had the least to do with causing the accident. Is this fair?

The concept of "strict liability" has also come under fire recently. Although

LIABILITY CRISIS . . . WHAT YOU CAN DO

the term "strict liability" may sound like a straight forward idea, in reality the concept boils down to the fact that the plaintiff **may not have to prove that the defendant was negligent**. Is this fair?

The standards of limitations and the standards of repose have also been questioned by legal authorities and consumers recently. The variance in the manner in which these two standards are interpreted and imposed from state to state, has resulted in insurance companies resorting to a new and far more restrictive policy form known as the "claims made form" in 1986. Currently, the limitations on when one can file a suit (dating from the time of the alleged incident or accident) differ from state to state.

How long is a manufacturer or supplier responsible for the product he sells? Recently, the state of Florida decided 12 years is the limit. If your airplane, car or toaster is more than 12 years old when it is involved in an incident, you can no longer sue the manufacturer for negligence in Florida. In some other states the manufacturer or supplier is liable for his product **for eternity** . . . which tends to raise insurance premiums considerably. Which concept is more fair?

Originally, punitive damage awards were assessed by the court against a manufacturer or supplier who was grossly and knowingly negligent. In these cases, the courts and the juries were punishing the defendant for behavior which was unconscionable. Today, courts and juries can and regularly do award punitive damages in spite of the fact that a manufacturer **has not been proven negligent** and in spite of the fact that his product **may meet all federal standards pertaining to it**. Is this fair?

As discussed in earlier articles on this subject, it is now becoming increasingly common for the "state-of-the-art" to be used **against** a defendant in lawsuits. After all, if one improves his product today . . . the original models must have been defective. Does this make sense?

These are just some of the issues that we believe are inequitable about the present system. Others have also brought up two additional issues which have been hotly contested by consumer groups and lawyers. Some feel that the contingency fee is at fault for a great number of the unjustifiable or frivolous lawsuits facing the court system today. Opponents of the contingency fee say that the fees are not "the keys to the courthouse doors for the poor" as trial lawyers say, but rather a "lottery" which lawyers play for windfall profits. The debate also rages over whether or not "caps" should be put on certain types of damage awards. In some states, certain malpractice awards are limited to specific cash amounts. In other cases, the states, themselves, are protecting themselves and their municipalities by legislating "caps" or award limits at specific levels. The states that have passed these liability limits for themselves and their municipalities have certainly

"How long is a manufacturer or supplier responsible for the product he sells?"

brought down their insurance premiums . . . however, they have left their state businesses and citizens out in the cold. The debate over these two issues has been loud and strong and will continue to be so. EAA has worked closely with congressional and senatorial staff members on the issues of liability and insurance availability and affordability. Many of these staff members who have been seeking reasonable solutions which would have a likelihood of passage on the floors of our federal deliberative bodies feel that both "caps" and "contingency fee limitations" would be too difficult to pass in the near future. They feel that opposition by the Association of Trial Lawyers of America would be insurmountable.

Since EAA began seeking a reasonable solution to this problem early last year, it has learned of several forward thinking and courageous senators and congressmen who have attempted to bring some logic and fairness back into the tort system through uniform federal product liability legislation. California Congressman Norman D. Shumway (R) has brought proposed federal uniform product liability legislation into the House of Representatives. From the state of Wisconsin, Senator Bob Kasten (R) has twice brought comprehensive federal uniform product liability legislation to the Commerce Committee where it was twice defeated. The Chairman of the Commerce Committee, Senator John Danforth (R-MO), has now prepared his second "working draft on product liability reform" which is being studied by interested parties. Senator Danforth says, "The growing crisis with respect to the availability of liability insurance only underscores the urgent need for product liability reform. This new draft is a timely and important step forward in our effort to come up with viable product liability reform legislation." The so-called "Danforth Draft" also includes two very interesting and promising innovations. A bill based upon the draft would establish a product liability review panel and an "expedited claims" procedure. Under the expedited claims procedure, people who have been harmed by a product would be able to receive just compensation from a manufacturer without resorting to the lengthy and expensive tort system now in place. Without hiring a lawyer or going to court, a person could receive, from the manufacturer, compensation for "net economic loss" including medical and rehabilitation expenses, lost income and other reasonable expenses. Of course, under this program both the plaintiff and the defendant would be required to agree upon this course of action. A federal arbitrator would assure that the claimant was justly compensated. If a claimant feels that this procedure would not result in "just compensation", he or she, of course, may resort to standard legal remedies. To obtain a copy of this draft legislation write to Arlene Sydell, Public Information Office, Senate Commerce Committee, Washington, DC 20510. Please include a self-addressed mailing label, if possible. (The draft is 59 pages long and too bulky to fit into a standard business envelope.)

Although it may not have a direct effect on "general liability", federal uniform product liability legislation would be an important first step toward solving the overall liability and insurance crisis.

WHAT YOU CAN DO

What can the individual EAA member do about this crisis facing all of us in aviation? **First of all**, EAA members must educate themselves on all of the issues. EAA cannot, of course, provide you with all of the answers. By the same

token, some members may not agree with the course of action being taken by EAA and supported by the majority of its members. They too should study the issues and take the action that their consciences demand. **Secondly**, after preparing ourselves, individually, we must bring this problem to the attention of our neighbors, the media and our elected officials. All too often, we have run into blank stares when we have brought up the issue of liability insurance. Some of our neighbors, some of our elected officials and some journalists either don't know about the problem . . . or don't care. **Thirdly**, we must, as consumers, demand our rights. More and more attention is being paid to liability matters across the country. EAA members should attempt to play a role in these discussion in any way that they can. For instance, EAA Headquarters staff members have worked with an insurance industry task force, with a business and industry coalition, has testified at public hearings on the state and local level and has testified before the U. S. Congress. Some of these opportunities are also open to individual members in their own hometowns. Perhaps there will be a product liability meeting at your state capitol. Maybe the media will carry a story on product liability issues. A coalition might be formed within your municipality or state. **In each and every one of these cases, you should get involved.**

"Under the expedited claims procedure, people who have been harmed by a product would be able to receive just compensation from a manufacturer without resorting to the lengthy and expensive tort system now in place."

Finally, U. S. EAA members must write letters and make telephone calls to their state and national representatives. Every EAA member has a congressman and a senator representing his or her interests in Washington, DC. Write to them and tell them what you think about the present situation and how you think it might be improved. If you live in the states of California or Wisconsin, write to Congressman Shumway or Senator Kasten, respectively. They have been actively pursuing federal uniform product liability legislation. If you support their efforts, they deserve to know about it. At the conclusion of this article is a complete list of senators on the Commerce, Science and Transportation Committee. This committee has twice considered and defeated Senator Kasten's bill. This is also the committee which will consider Senator Danforth's bill. If you are a constituent of one of these senators, write and tell him or her that you believe that product liability reform must be voted out of committee and onto the floor of the senate so that it can be publicly debated. If your senator is not on the commerce committee, write to the committee's chairman, John Danforth, directly. His proposed draft on product liability reform holds great promise and he should know that he has your support.

As previously reported, EAA testified before the House Subcommittee on Transportation, Aviation and Materials, on October 22 of last year. We found the congressmen and staff members of this subcommittee extremely understanding and sympathetic to the cause of aviation. Chairman George E. Brown, Jr. (D) and Congressman Dan Glickman (D) are particularly interested in the effect of overly expensive or unavailable liability insurance on aviation and technology. You should certainly consider addressing a letter to them. At the conclusion of this article, we will also publish a listing of all of the congressmen on the subcommittee.

We EAA members are 100,000 consumers. If each one of us writes four letters, one to our senator, one to our congressman, one to the chairman or a member of the commerce committee and one to the chairman or member of the Congressional Subcommittee on Transportation, Aviation and Materials, we will have a significant impact on the future. Write individual letters. Petitions and form letters are ineffective. Also since your representatives have no requirement to share their correspondence with EAA or other members of the general public, please send a copy of your letter (and any reply) to the Office of Government Affairs at EAA Headquarters. Your correspondence will be used in building a file of individual comments which one day may be useful on the floor of the senate. Your action and your input is very important. If you don't write, we can be sure that our concerns will go largely ignored. The liability and insurance situation will continue to deteriorate. If you don't write, you can be sure that any reform package will contain little help for the aviation community. The choice is ours.

Your EAA Headquarters staff will continue to monitor the progress toward reform on all fronts. We will watch for any significant changes and keep you informed through the pages of SPORT AVIATION. We will work with the appropriate authorities toward sensible and logical reform which will be beneficial for the aviation community. It is now time for all of us to act, we must not sit back, silently, while others do our thinking for us.

U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

ADDRESS:
The Honorable . . . . .
Senate Office Building
Washington, DC 20510

SALUTATION:
Dear Senator:

JOHN C. DANFORTH, Missouri, Chairman
BOB PACKWOOD, Oregon
BARRY GOLDWATER, Arizona
NANCY LANDON KASSEBAUM, Kansas
LARRY PRESSLER, South Dakota
SLADE GORTON, Washington
TED STEVENS, Alaska
BOB KASTEN, Wisconsin
PAUL S. TRIBLE, Virginia
ERNEST F. HOLLINGS, South Carolina
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DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
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J. JAMES EXON, Nebraska
ALBERT GORE, JR., Tennessee
JOHN D. ROCKEFELLER, IV, West Virginia

U. S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON TRANSPORTATION, AVIATION AND MATERIALS

ADDRESS:
The Honorable . . . . .
House Office Building
Washington, DC 20515

SALUTATION:
Dear Mr. . . . . — or —
Dear Congressman

GEORGE E. BROWN, JR., California
DAN GLICKMAN, Kansas
HARRY M. REID, Nevada
BILL NELSON, Florida
BART GORDON, Tennessee
TOM LEWIS, Florida
SHERWOOD L. BOEHLERT, New York
RON PACKARD, California

March '86

by Henry M. Ogrodzinski, Director of Corporate Communication

AVIATION PRODUCTS LIABILITY ARBITRATION BOARD
An Idea Which Deserves Consideration

The concept of an arbitration board which mediates disputes, resolves conflicts and awards financial judgments to injured parties is an idea that has been accepted by several U. S. industries and professions. The principle of arbitration is also used in many European countries. Perhaps it's time to apply the system to sport and general aviation liability claims.

Malcolm Lawrence, the Managing Director of Aviation Composites Ltd. (Great Britain) and President of INAV, Inc. (USA) met with the EAA staff in January. He proposed the establishment of an "Aviation Products Arbitration Board to deal with product liability claims." He based his concept on two innovative sections of Senator John Danforth's (R-MO) draft of federal uniform product liability legislation, the "product liability review panel" and the "expedited product liability claims procedure". Mr. Lawrence's premise reduces a complex issue to its simplest form. As a result, the Aviation Products Arbitration Board may be a quick, fair and efficient means of handling product liability claims in sport and general aviation.

EAA feels that any reformation of the present system should encourage safety and must compensate victims while accomplishing these tasks in the most efficient means possible. Mr. Lawrence's proposal seems to meet these criteria without resorting to state or federal law making procedures which might lead to protracted delays. His proposal does not seem to have a negative effect on legislative efforts, nor will it adversely affect the rights of consumers.

In our fifth article on the product liability and insurance availability crisis, we review Mr. Lawrence's proposal and ask him to fill us in on the details.

We asked Mr. Lawrence to tell us why he has developed this proposal.

*"With product liability insurance being almost unobtainable for smaller companies, it is obvious that we must reduce the pressure that has resulted in this unfortunate state of affairs. The objective of this proposal is to ensure that aviation companies can obtain product liability insurance . . . and obtain it at reasonable rates. I have discussed this issue with aviation liability insurance underwriters. They say that improving the current situation will require the lessening of **unjustifiably assessed** punitive damages that are sometimes handed down by juries and getting rid of nuisance suits . . . people who think they can make a buck when they really don't have any case at all.*

"Clearly, no one wants to disown their responsibilities. No responsible manufacturer ever wants to do anything of that nature. However, one does have to look at the situation and say that this is a problem we must solve."

HOW DOES IT WORK?

EAA staff members have had an in-depth discussion with Mr. Lawrence regarding his proposal. We have also reviewed a complete written draft which outlines all facets of the proposal. The following is a synopsis of the overall program.

"We have all seen companies go into bankruptcy . . . perhaps they can't afford the awards, perhaps they wish to get away from their responsibilities. So what happens to the poor person who is injured? If there is a fund there, maybe we can do something for them."

Within two years of the accident, a person may file a claim with the manufacturer or service organization. Within ten days of receiving this notice, the manufacturer or seller provides the consumer with a comprehensive information package detailing all aspects of this program including the consumer's right to representation by counsel and including the forms required for filing a claim.

The person or estate seeking to recover damages from a manufacturer or service company will return the forms, accompanied by reasonable proof that the product or service actually caused harm.

Generally, the claimant will seek payment for "net economic loss" which includes any and all medical bills, lost potential income, rehabilitation expenses and other reasonable expenses over and above those already covered by workman's compensation and life or accident insurance.

The manufacturer will be considered liable if the product or service caused the harm, that it was unreasonably dangerous and that the harm occurred while the product or service was being used in the intended manner. In the case of pilot error, the award would be adjusted accordingly. Pilot error would contribute to the cause of the incident or accident if the aircraft was operated outside of its published limitations or if any violation of the FARs occurred.

PAYMENT OR REJECTION OF A CLAIM

Within 90 days of receiving a claim the manufacturer will determine whether or not it is liable.

If the manufacturer decides not to contest liability, it will notify the claimant and either make full payment or enter into a mutually acceptable agreement.

If the manufacturer feels it is not liable for the damages, it will advise the claimant of its decision together with the reasons for its rejection of the claim and an explanation of the claimant's rights.

Once the manufacturer tells the claimant that it will not pay a claim, the petitioner has two alternatives. He or she may initate "binding arbitration" by requesting an arbitrator from the Aviation Products Arbitration Board or the claimant has the option of turning to the legal system and filing suit against the manufacturer in court.

If the claimant seeks arbitration, the manufacturer must submit to arbitration and will be bound by the final determination of the proceedings. The findings of the arbitrator will be considered final and conclusive for both the manufacturer and the claimant. According to the present proposal, the claimant (if dissatisfied) would still have the right to file suit, but the manufacturer and insurance companies would make no out of court settlements if that course of action was chosen.

IN A NUTSHELL

That's it. Quick and simple. If you are injured by a defective product, you bring the matter to the attention of the manufacturer. The manufacturer either quickly agrees to pay you for your net economic loss or you resort to an impartial Aviation Products Arbitration Board which resolves the matter far more quickly than any court in the land. Seem too good to be true? Maybe. But Mr. Lawrence has put a great deal of thought into his proposal. We asked him why any

AVIATION PRODUCTS LIABILITY ARBITRATION BOARD

An Idea Which Deserves Consideration

injured party would choose to go the route of the Aviation Products Arbitration Board rather than suing in the courts.

Mr. Lawrence — *"Well, we all know that if the parties concerned want to take a case to court, they can prevaricate for up to five years before any sort of judgment is actually handed down. I don't think that that is in the interest of either the claimant or the corporation. In the case of a death or grievous injury, there is a family that requires immediate compensation. The family will suffer quite a lot. I don't think that is necessary or fair. One would expect the Arbitration Board to come down with a decision within five to six weeks."*

EAA — Why would the general and sport aviation suppliers and manufacturers cooperate with the Aviation Products Arbitration Board and abide by its decisions?

Mr. Lawrence — *"It is in our best interest to cooperate. If some sort of common sense of approach to product liability is provided to the aviation industry ... then the insurance companies will lessen the level of insurance premiums. Anything that actually cuts costs will be beneficial for all manufacturers."*

Mr. Lawrence told us that he foresaw a decrease in insurance premiums for companies cooperating with the Aviation Products Arbitration Board. He said that underwriters at Lloyds of London agreed and encouraged him to promote the idea in the U. S. *"Their reaction, of course, is that if American law were similar to British law, we would not be experiencing our present problems. Obtaining affordable product liability insurance in England is not a problem."* He also told us that arbitration programs work extensively throughout Europe. He said, *"It works as a voluntary process in England and there is no reason why it can't work as a voluntary process in the United States."*

PUNITIVE DAMAGES

Mr. Lawrence suggests that punitive damages should not be awarded where the product complies with standards established or approved by the Federal Aviation Administration or by other responsible government agencies. However, the proposal does not eliminate punitive damages. They may be assessed if it is established that the harm was the result of conduct of conscious, flagrant indifference to the safety.

If punitive damages are assessed under the proposal "attorneys would not be eligible for any portion of punitive fees paid by a manufacturer or seller beyond an hourly rate deemed reasonable on the basis of community standards." We asked Mr. Lawrence to explain these provisions of his proposal.

Mr. Lawrence — *"Punitive damages were originally brought about as a method of censure of the manufacturer so that you didn't allow him to say, 'Well, it is cheaper to go to court rather than make the product right.' There are many cases in which the manufacturer cannot pay the awards ordered by the courts. They simply cannot afford it. We ought to build a fund from the punitive damages and establish a system to determine the utilization of the money. The fund should be administered by the Aviation Products Arbitration Board. We would then be able to assist the injured. We have all seen companies go into bankruptcy ... perhaps they can't afford the awards, perhaps they wish to get away from their responsibilities. So what happens to the poor person who is injured? If there is a fund there, maybe we can do something for him."*

We asked Mr. Lawrence about the similarities between the Expedited Claims Procedure in Senator Danforth's draft legislation and the Aviation Products Arbitration Board.

"I believe that we may even be able to assist the credibility of the Danforth bill if we can make this Arbitration Board work fairly."

Mr. Lawrence — *"We quite deliberately run parallel to Senator Danforth's bill ... with two objects in mind. One was that if the Danforth bill were to subsequently become law, what we've done is not going to cut across the law. But more importantly, I believe that we may be even able to assist the credibility of the Danforth bill if we can make this Arbitration Board work fairly."*

EAA — EAA is an aviation consumer's organization representing 100,000 aviation enthusiasts. It is EAA's responsibility to expose any program which would result in the "fox minding the chicken coop."

Mr. Lawrence — *"It would be the fox minding the chicken coop if the manufacturer were the only representative on the Arbitration Board. One of our reasons in discussing this proposal with the consumer bodies, such as EAA, is to give some credibility to the program. One hopes that the aviation consumer organizations would nominate arbitrators and they would, in fact, police the people they nominated. If the arbitrators do not do a fair and reasonable job, it is up to the consumer groups to take them off the list of arbitrators."*

EAA — In your proposal, there is a requirement that attorneys be paid at their usual hourly rate rather than being awarded a percentage of the overall judgment as a contingency fee. Why?

Mr. Lawrence — *"I think that if the contingency system did not exist in America, then we wouldn't have many of the silly suits that we see going on. It will be no more difficult to bring a case before the Aviation Products Arbitration Board than to take one to court ... but the Board, by its very nature, will stop a certain amount of ambulance chasing."*

EAA — Why are you bringing forth your proposal now rather than waiting for the senate to react to Senator Danforth's bill?

Mr. Lawrence — *"We either do something now or we wait until tort law is changed. If we wait that length of time, the aviation industry will be in an even bigger mess than it is today. More importantly, anyone in the industry who survives this crisis is going to be paying around 40% of the cost of his airplane in the form of product liability insurance premiums. Now, if the general public can stand that sort of monitary censure ... fine. But I don't think that many of the smaller aviation businesses can wait that long or pay that much ... I know that we (INAV) can't."*

EAA'S REACTION

EAA believes that Mr. Lawrence's proposal for an Aviation Products Arbitration Board should be considered by all members of the aviation community including consumers, manufacturers, suppliers, and insurance companies. All members of the aviation community are being adversely affected by the current crisis. Ideas, such as this one, may help bring forth additional creative thinking which will lead us from the brink of disaster. It is an idea we can build on.

We also hope that this proposal is widely discussed and evaluated by our elected officials. The positive factors seem to far outweigh any negatives. EAA views this simple measure as an interim proposal which may result in a short term solution. It does not change our need, in the long run, for uniform federal product liability legislation.

We believe that there is room, within the proposal, for compromise. To those who would react negatively to the concept, we say, "If we want it to work ... we can make it work." This proposal and any other sensible effort directed toward returning logic and reason to the tort system, deserves our attention and our support.

EAA continues to urge its members to write to their elected state and federal officials regarding the product liability and insurance availability crisis. We must demand that they focus their attentions on this critical issue. Together we can make a difference. We can also be encouraged by the fact that the mass media is paying more attention to the crisis than they were when EAA began publicly discussing this important problem early last year. U. S. NEWS AND WORLD REPORT (January 27, 1986) has published a particularly thoughtful and well balanced analysis of the problem.

18701 58TH AVENUE N.E.
ARLINGTON, WA 98223

206/435-8533

STODDARD-HAMILTON
AIRCRAFT INCORPORATED

June 4, 1986

Senator Bob Kasten
Attention: Steve Loucks
SH-110
Washington, D.C. 20510

Dear Mr. Kasten:

This letter is in response to your letter dated May 12 regarding our reluctance to place on the market new and innovative aircraft products.

We are a nine year old company that has pioneered the use of low cost composite aircraft products in production utilizing the latest in plastics and fibers available. We have produced over 700 complete airframes in the last 6 years making us the largest dollar volume homebuilt kit manufacturer. This experiance has led us into many different fields utilizing our technology. We have had many people in from all over the world to witness some very exciting methods to building aircraft.

With all the encouragement from different aviation entities throughout the would we proceeded to improve on what we felt was a very good technique. Introducing even more modular building methods with compression resin molded ribs and shearwebs, wing construction time was reduced to a fraction of the time it takes to build one conventionally out of metal. We had the FAA come in and look at the process and there was overwhelming approval especially with the redundant quality control methods that the manufacturing afforded. Being once again incouraged we went ahead with the filing for "type certification" because of our ability to be very competitive with the existing products on the market.

We did extensive number crunching with very good data because of our past experiance with our materials in production and a good feel for the market place because of our intimacy with aviation. Let's face it, it isn't hard to compete with 1950's technology which is used in general aviation today. The results looked very good assuming a 4 to 7 percent product liability premium on gross sales. We at this time were paying about 35,000 dollars for product liability insurance on about 2.5 mil in sales.

The following year we were cancelled by our insurance company even though we had never ever had a file claimed against us and had never had a hint of life threatening structural problems with our aircraft. In a search for replacement insurance we found only one company that would even quote us on our kit built aircraft and that was at 770,000 dollars per year on sales of

3 mil. for that program. With the certified aircraft program insurance premium quotes were either not available or one would not commit until the actual completion of the type certificate and some track record was set. Well it becomes very hard to invest around 5 million dollars into a program and not have it known whether you can insure the company.

With this knowledge we have since abandoned all efforts to certify the aircraft and have pursued other market places especially militarily overseas with little or no liability exposure. Our corporation that builds the kit aircraft has no liability insurance and again there is very little incentive to build equity into the structure and introduce new product improvements such as some of the newly developed modular wing componants.

To build equity into a corporation without insurance is for fools especially with the track record of the settlements, mixed up tort law, and bazarre punitive damage awards going to the wrong parties. Flying is risky yet why should the risk that one individual takes be reflected by the rates given to the many. If one goes up in a small aircraft he makes a decision to assume a certain amount of risk. If it was well understood before the individual(s) left the ground what form of risk he was taking (such as if you die the maximum that your family could receive would be $500,000 dollars) then the problem could be reduced greatly. Insurance would then be available at a reasonable rate again and the American dream and the use of our God given creativity would allow progress once again in this industry and others alike.

Sincerely,

STODDARD-HAMILTON AIRCRAFT, INC.

Thomas S. Hamilton
Chairman

TSH:ws

UNISON INDUSTRIES, INC.

530 Blackhawk Park Avenue
Rockford, Illinois 61108
815/965-4700

STATEMENT OF

FREDERICK B. SONTAG

PRESIDENT, UNISON INDUSTRIES, INC.

FOR THE

SUBCOMMITTEE ON TRANSPORTATION, AVIATION AND MATERIALS

HOUSE COMMITTEE ON SCIENCE AND TECHNOLOGY

OCTOBER 22, 1985

My name is Rick Sontag. I'm President of Unison Industries located in Rockford, Illinois. We employ 100 people in the manufacture of magnetos and ignition wiring for small airplanes. Magnetos are the electromechanical devices that produce the ignition spark to fire a small airplane's engine.

Recently, my company scrapped a year's worth of marketing and engineering research on a totally new electronic ignition product. The product would have significantly improved the performance and maintenance expense on today's piston aircraft engines.

The reason we did so was not economic or technical. We felt we could handle those aspects. We were mostly concerned with the potential product liability risk of such an innovative product. We were afraid of becoming a technological pioneer and potentially subjecting ourselves to some plaintiff's attorney second guessing our decisions in a lawsuit.

That may sound crazy, but let me relate some of the everyday products liability experiences which contributed to our decision.

Take, for example, a 1977 Chicago incident involving 3 young men who crashed their airplane shortly after reporting engine difficulties. The plane struck an industrial building, killing one of the men, seriously injuring the others, and destroying the building. We and 17 other companies who manufactured components for the airplane were each sued for $23,000,000.

In 4 years of investigative work by the plaintiffs, the FAA, and the NTSB, it was clearly shown that our product had absolutely nothing to do with the accident. In fact, the plaintiff's attorney told us privately that he had no case against us. Nevertheless, he refused to let us out of the lawsuit for over four years. We finally had to "buy our way out" by paying the plaintiff $63,000 as a settlement. By then we owed our own attorneys over $55,000.

As you can see, your product does not need to cause damage or injury in order for your company to end up paying a lot of money.

It seems these days that when someone is injured or property is damaged, people feel that "someone has to pay for it." At times that means someone paying for it even when the facts do not show he is liable for it. Or even when the facts clearly show that the injured person was really responsible for his own injury.

Take, for example, what happened to our company as a result of an accident in New York.

In 1980, a young part-time employee of an aircraft training and maintenance facility mistakenly allowed a student pilot and his instructor to fly an airplane which was not supposed to be flown. The plane had had magneto problems and had not yet been serviced. On the first takeoff, the plane crashed, killing the student and instructor. Due to the crash as well as years of similar operating problems, the City of New York closed down the training and maintenance facility.

Our company was sued for $20,000,000 in "lost profits" by the maintenance facility, who alleged that our magnetos caused the crash which caused the company's demise. They also sued the City of New York and many others. Ultimately there were 6 different lawsuits and 9 law firms involved. Using the plane with the magneto problems was clearly the responsibility of the maintenance facility. Nevertheless, our company eventually paid $10,000 for our dismissal from the suits after 4 years and $46,000 in attorney's bills.

Somehow, we have lost the concept that people must take some responsibility for their own actions. Years ago people recognized that they had some culpability for damages and injuries caused by their own decisions. They didn't seek other people to blame for their own stupidity and errors. But today that is changing.

Can you imagine how much progress we would have had in this country if the first pilot to crash an airplane due to his own negligence sued the airplane manufacturer, the engine manufacturer, the Wright Brothers, the owner of the field he took off from and everyone else in sight? How much incentive would these pioneers in technology have had to continue their exciting developments?

These days you can even be sued in products liability when your product is not at all involved. Early this year, for example, we were sued by a Kansas man for a 1983 injury he sustained while turning his plane's propeller by hand. After $5000 in attorney's fees and 2 months' investigation, it turned out that he had our competitor's magnetos on his airplane -- not ours! In the one year since the accident, he hadn't even taken the time to read the labels on the magnetos before he sued. And his attorney added insult to injury by not agreeing to dismiss us from the suit unless we agreed not to sue him for his mistake.

Perhaps the state of affairs in products liability is best summed up by a California attorney whose airplane engine was damaged by a mechanic who mistakenly attached the magneto to the engine using a wrong nut. The attorney sued us for compensatory damages and $1,000,000 in punitive damages. He admitted his mechanic had made a mistake.

"But," he said, "my mechanic hasn't got any money. You do. You didn't warn him not to use the wrong nut. And besides, this is California. All the products liability laws in most states are modelled after California's, I can sue you for anything here. And win. You go after my mechanic if you want to. I'm coming after you."

Guess what? He was right. We wound up paying him $5,000 to dismiss the case, on top of $4,000 in fees for our attorneys.

These kinds of experiences are frustrating for large companies, but for small companies such as ours, they are totally demoralizing. After experiences like these, many entrepreneurs and small businessmen throw up their arms in exasperation. Some even quit business altogether. For sure, all, including our company, are much more cautious about taking pioneering positions. That's why our company scrapped our electronic ignition project. Pioneering efforts provide too much cannon fodder for plaintiff's attorneys.

This country was built by people with innovative ideas not afraid to take a chance. Independent free thinkers who were willing to risk a few steps backward in order to make a bold step forward.

Most of the major technological innovations in America have come from these small business entrepreneurs -- not big business. The airplane, the light bulb, the Xerox machine, the personal computer to name a few. And the Small Business Administration estimates that more new jobs in America are created by these small businesses than by large businesses.

We can't continue to stymie the creativity of these small businesses by allowing our products liability system to degrade. The current system must be replaced by a more equitable one. The theme "Somebody has to pay for it" has got to change to "The responsible party must pay for it."

The legal profession and the judiciary have been unable to police themselves to make these changes. So the changes must come from Congress.

Rest assured, if we can't change our products liability system to allow our small businesses to innovate, more future innovations and products will be made overseas. Most foreign companies have little products liability experience or history to hold them back. So while we slowly strangle our technology, we will create bigger openings for foreign competition than the ones we now fear from unfair foreign trade practices.

As an American entrepreneur who would like to get on with the business of building America, I know I speak for all entrepreneurs and small business-men when I say we need your help.

UNISON INDUSTRIES, INC.

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STATEMENT OF

FREDERICK B. SONTAG

PRESIDENT, UNISON INDUSTRIES, INC.

FOR THE

AVIATION SUBCOMMITTEE OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

JUNE 18, 1986

MORE RECENT

You have heard the views from the large corporations of our industry. Now I will give you the view of the small company.

My name is Rick Sontag. I am President of Unison Industries in Rockford, Illinois. We employ 100 people in the manufacture of magnetos and other ignition components for small piston engine airplanes. Magnetos supply the spark to run the engine of the plane. So chances are if you have flown in a small airplane, your plane's engine was kept running by our products.

Our business is no different from the other hundreds of small businesses which supply components to the general aviation industry. We do not have staff specialists employed to handle product liability claims or insurance. Our Vice President of Marketing and I are the Litigation Department at Unison and we both are heavily involved in all of our claims. Over the last 6 years I have personally been involved in 15 major product liability lawsuits and over 50 major damage claims which were settled without litigation.

In the last several years, our company has been sued in shotgun lawsuits where as many as 50 defendants were named. We have been sued when the damage was the responsibility of the aircraft mechanic. We have been sued when the pilot was

clearly responsible for his own death. We have even been sued when our product was not on the airplane which caused the injury.

Of the 15 lawsuits on which I have spent time, our company felt that our product could have contributed to the accident in only 2 of them. In 13 of 15 lawsuits we felt we had nothing to do with the accident, but nevertheless we have made settlements as high as $65,000 in addition to $60,000 in attorney fees just to buy our way out of a single lawsuit.

The impact of all this litigation and threatened litigation on our company has been severe. As you are aware, the general aviation market is severely depressed, due in large part to product liability. Because of the drop in our business, our company employs less than 50% of the people we had in 1979.

We have also had other financial effects from the product liability crisis. For example, our product liability insurance cost last year escalated from $109,000 to $250,000 per year. This in spite of our having the best year in the last several years for product liability claims and damage payments. We cannot pass this premium increase on totally to our customers, and so our operating budget had to be reduced to make ends meet.

The product liability problem has also stifled innovation at our company. A few years ago we scrapped an advanced electronic ignition project because we were afraid to pioneer such a liability risk. Today our company will only undertake technologically innovative aircraft product development if we have the sponsorship of a larger company. We cannot afford to take the liability risk alone.

Our product liability problem also makes it difficult to obtain suppliers, since most manufacturers will not take on the risk of making a product which goes on an airplane. In fact, due to the difficulty in obtaining suppliers, we have been forced to make most of our components ourselves -- often at higher cost.

The current product liability crisis has also created a new class of competitors for us and others. New firms have now begun to manufacture replacement parts for aircraft and aircraft components without the same rigorous testing and development as the original manufacturer. Many of these companies carry no product liability insurance and have a business plan to go bankrupt in the event they are faced with a large product liability judgment. One such firm was recently granted FAA approval to make parts for our magnetos. In addition to raising our own company's product liability exposure, this company's inability to satisfy a

judgment could leave some injured party holding an empty bag or pursuing an innocent party such as us to get compensation.

But the worst impact on our company is the distraction of our management to matters of litigation and potential litigation and the loss of valuable management time. In a major lawsuit it is not unusual for our key managers to spend 20% of their time in depositions, requests for production and other matters associated with the suit.

A small company survives partially by its ability to take quick actions and move rapidly in the marketplace. With our company's managers and engineers tied up frequently in product liability matters, our company is gradually losing this edge.

The current system is unfair. In our case, all a plaintiff's attorney needs to sue us is any reasonable theory that the plane could have crashed due to engine failure. A witness hearing an engine sputter or even the assertion that the engine could have lost power due to magneto problems is enough in most states to bring a lawsuit against our company. Once our company is named in a lawsuit, we estimate we will pay a minimum of $10,000 in either litigation or settlement expense even if our product has nothing to do with the accident. And the stakes get

higher when the suit looks like it will bring a high jury verdict. With the deck stacked against us in the form of joint and several liability, strict liability and rules disallowing logical arguments such as existing state-of-the-art technology, we and our insurers often succumb to the extortion of plaintiff's attorneys rather than risk the cost of litigation and unpredictable juries to prove our innocence. Most other companies take the same position. And plaintiffs' attorneys know it.

Some people feel that the situation can be improved by simply regulating rates charged by insurers -- much the same way the government tried to control inflation in the 70's with wage and price controls. Not only does it make no sense to regulate insurance companies' incomes with the stroke of a pen, but in our industry it would do no good. There are less than 10 major underwriters of aircraft product liability insurance worldwide. Half of those are not in the U.S. There are fewer than 5 major re-insurers of aircraft product liability insurance. And they are all in Europe. U.S. price controls cannot regulate a marketplace which is dominated by overseas companies with no U.S. presence.

Our insurance underwriters tell us that the foreign insurance groups have demanded extraordinary premium increases due to the unpredictability of the U.S. legal system. The size of damage awards in aircraft products liability is growing dramatically. And the underwriters are losing money. They felt they had no choice but to raise rates.

If we want aircraft product liability insurance rates to stabilize or come down, and if we want small aircraft component manufacturing companies such as ours to get back to the business of innovating and building America, we must change the rules regarding product liability. 90% of our market is gone, and many foreign companies who know they are safe from our legal system are drawing a bead on what is left of what once was a dominant U.S. industry. Time is running out. We cannot wait for a general bill to travel the long path that the original S.100 did. Senator Kassebaum's amendment changes the most inequitable features of the law regarding general aviation. I and most small aviation component suppliers feel we need this legislation now.

[From the Rockford Register Star, Feb. 16, 986]

The torts and the hare

Worries about liability shackle innovative U.S. air industry, but not competitors

By Doug Adams
The Register Star

Rick Sontag's company, Unison Industries Inc., of Rockford, spent $250,000 designing and building a better product, only to find itself unable to offer it for sale because of the high cost of product liability insurance.

"We scrapped a year's research on a totally new electronic ignition system," Sontag said. "The reason was not economic or technical — it was the potential product liability risk of being a pioneer of an innovative product."

Sontag, a dynamic young industrialist, is president of Unison, which he bought in 1980 when it was known as Slick Electro, which descended from the old J.I. Case Co., the farm machinery firm long gone from the Rockford scene.

Sontag has bachelor's and master's degrees in physics and an MBA from the Harvard Business School. "I handle our product liability issues as much as I am able to, subject to our what our insurers think."

The new product developed by Unison is an electronic ignition system for small, piston-engine airplanes. Unison of Rockford and Bendix, the international diversified manufacturing firm, split about evenly virtually all of the world market for small plane ignition systems, Sontag said.

The core of such systems is a magneto, which generates high-voltage impulses when its armature is turned, and a wiring harness connecting the device to the spark plugs in the engine.

As Slick Electro, the Rockford company made magneto systems that were derived from the magneto systems made for J.I. Case farm tractor engines. "Our present systems are direct descendants of the old Case systems," Sontag said.

Unison now employs about 100 workers in its plant on Blackhawk Park Avenue, where 90 percent of the activity is devoted to the airplane ignition systems. The company also has an aluminum die casting division that produces parts for other Rockford industries.

"The problem in being a pioneer with a product for airplane use, such as we have developed," Sontag said, "is that you place yourself under intense scrutiny and become what we call an 'easy kill' in today's court system."

The way the tort liability system now works, Sontag said, "if an airplane containing the small parts we built crashes for any reason whatsoever, we'll be sued, maybe for millions, even before anyone knows who or what caused the crash."

Insurance companies know this, and raise their premiums to accommodate that extraordinary risk. Sontag's product liability insurance premium this year, he said, is $250,000, "and that's without the new product we could market."

As example of what he called the ridiculousness of the present civil damages court system lies in a California airplane crash case. Four people died in the crash of the small plane shortly after it lifted off from a Long Beach airport, Sontag said.

"National Transportation Safety Board and Federal Aviation Administration officials blamed the crash on pilot error for overloading a rented airplane of a type he had never before flown," Sontag said.

This crash resulted in the filing of a multi-million-dollar lawsuit by the widow of one of the victims, naming 30 to 40 defendants, including both Unison and Bendix.

"But look," Sontag said, "anyone at all familiar with airplanes knows that a particular model has either a Slick (Unison) magneto, or a Bendix, and it can't have both because there's only one set on a plane."

As it turned out, the plane wasn't equipped with a Unison magneto.

But that wasn't the end of the case for Unison.

"Believe it or not," Sontag said, "the widow's lawyers came after us anyway with an offer to take our name off the list of defendants for $10,000. Now, we both knew very well that Unison wasn't involved in any way in this crash. But the lawyers also knew that it would be expensive for us to prove it.

"Personally, I'd reject such an offer, but the insurance company felt differently about it, so we settled out for $5,000 plus, of course, our legal costs. It's a neat little game for attorneys to play."

That is just one of Sontag's many arguments for an overhaul of the tort liability court system.

In an earlier Chicago case, Sontag testified last fall before the U.S. House Subcommittee on Aviation and Materials of the Science and Technology Committee. Unison was one of 18 companies sued for $23 million as a result of a private plane crash. Sontag told the committee:

"In four years of investigative work by the plaintiffs, the NTSB, and the FAA, it was clearly shown that our product had absolutely nothing to do with the accident.

"In fact, the plaintiff's attorney told us privately that he had no case against us. Nevertheless, he refused to let us out of the lawsuit for over four years. We finally had to 'buy our way out' by paying the plaintiff $63,000 as a settlement. By then we owed our own attorneys over $66,000.

"As you see," Sontag told the congressional group, "your product does not need to cause damage or injury for your company to end up paying a lot of money."

In 1986, Sontag said at the subcommittee hearing, "we were sued by a Kansas man for a 1963 injury he sustained while turning his plane's propeller by hand. After $5,000 in attorney's fees and two months of investigation, it turned out he had our competitor's magnetos on his airplane, not ours. In the one year since the accident, he hadn't even taken the time to read the labels on the magnetos before he sued.

"And his attorney added insult to injury by not agreeing to dismiss us from the suit unless we agreed not to sue him for his mistake."

In a New York case in which it was sued for $20 million, Unison was cleared of responsibility but had to pay $10,000 to get its name off the lawsuit, and had to pay its attorneys $46,000 for their work on the case over four years.

"Somehow," Sontag said, "we have lost the concept that people must take some responsibility for their own actions. Years ago, people recognized that they had some culpability for damages and injuries caused by their own decisions."

"Can you imagine," Sontag continued, "how much progress we would have had in this country if the first pilot to crash an airplane due to his own negligence sued the airplane manufacturer, the engine manufacturer, the Wright brothers, the owner of the field he took off from, and everyone else in sight?

"How much incentive would these pioneers in technology have had to continue their exciting developments?"

If we don't change the system to allow small businesses to innovate, more future products will come from overseas, Sontag said. "As an American entrepreneur, I'd like to get on with the business of building America. We must solve the product liability problem that is suffocating the creativity of small business."

How? That is the big question.

A consensus of opinions from the product people and the insurance industry indicates three possible avenues for improvement:

- Enact a federal uniform tort liability law applicable to airplane cases in all states, just as federal laws regulate all other aspects of the aviation industry.
- Enact a statute of repose, limiting the length of time a manufacturer is responsible for faults in his products.
- Don't allow product improvements to be used as evidence that earlier state-of-the-art products were faulty.

Robert Martin, general counsel for Beech Aircraft, one of the biggest and most successful remaining makers of smaller civil airplanes, testified along with Rockford's Sontag at the congressional hearing.

Laying a share of the blame for the product liability insurance problem in the lape of insurance companies, Martin said that "insurance companies are more willing to make nuisance settlements, aptly termed 'cost of defense settlements,' than bring cases to trial, and this pollutes the judicial environment."

Martin took Beech into self-insurance in 1972 as away of fighting the lawsuit problem. Now, Martin's men themselves, rather than only official government investigators, investigate every Beechcraft accident that involves death or severe injury.

On the basis of these investigations, Martin advises Beech to either settle or litigate an ensuing claim. "Of all the cases we have litigated," Martin said, "we have won 90-plus percent."

During the hearing in Washington, Martin said: "The survivors of a person killed or injured as the result of poorly designed or manufactured products should not be without remedy and no one suggests that they should. But to maintain a system as unmanageable and inefficient as product liability tort system has proved to be is an extravagance that neither the industry nor the nation can now afford.

"The present system, which permits and even encourages unrestrained, unjustified, and costly litigation, produces exorbitant awards for a few, inadquate awards for some, and no awards at all for many who are truly innocent of any negligence or wrongdoing."

Raymond Hall, a vice president of Avemco Insurance Corp., told Aviation International News earlier this month that the product liability issue has forced his company's hasty withdrawal from writing liability policies for aviation component manfacturers.

Hall blames the liability doctrine as being directly responsible for the present plight of the manufacturers, Aviation News reported.

"It doesn't allow any honest mistakes," he said. "As a result, manufacturers couldn't admit liability, but had to defend themselves in court —denying guilt until they were proven guilty. This gave rise to a rash of bad-faith punitive damage awards." Hall hopes for legislative remedies, including putting what he calls a realistic cap on punitive damage judgments.

On the other side of the coin, Arthur Alan Wolk, Philadelphia, plaintiff's attorney in many aircraft lawsuits, disagrees with the idea that jury awards often are excessive.

"Jury awards are commensurate with conduct they have observed," he said. "We have a perspective problem when considering product liability in aviation. We are looking at the result and not the cause. With this sort of tunnel vision, we will never solve the product liability problem, nor, more important, the problem of design and production of safe aircraft."

Wolk, while philosophically opposed to Beech's outspoken chief counsel, Martin, continues to fly his own Beech Duke twin-engine plane, the third Beech plane he has owned and flown.

Wolk told Aviation News he works on a 30 percent contingency basis, and defended the practice. It is not unusual, he said, for his firm to spend $50,000 to $100,000 on a case before it reaches a courtroom. The contingency fee system, he said, enables people who might not otherwise be able to afford it to have their day in court.

Plaintiff attorneys who fail to win their case have to eat all the expenses and get no fee. The defense attorneys, he said, are paid win or lose, "for each hour or part of an hour they spend on a case, plus all expenses."

Sontag, who is a member of the General Aviation Manufacturers Association product liability committee, said that it now costs $70,000 per airplane for product liability insurance. "One of the reasons," he said, "is that you buy a policy to cover everything you've ever made."

There are only 10 firms in the world now writing general aviation liability insurance, Sontag said, and only three of these are in the United States. Lloyd's of London, which is a syndicate of private risk-takers, backs up virtually all of the liability policies as a reinsurer.

Senator KASTEN. Henry, thank you very much. I would like to hear now from the second witness on the panel, Mr. John Maher, who in addition to his association with Irish Festivals, is also the secretary of the United Festivals of Milwaukee, Inc. which is the umbrella organization for all of Milwaukee's festivals. Mr. Maher, we look forward to your testimony.

Mr. MAHER. Thank you very much, Senator. These festivals, in addition to Irish Fest, include Afro Fest, Festa Italiana, Fiesta Mexicana, German Fest, and Polish Fest. Altogether, these festivals represent over 10,000 volunteers working together to present festivals which attract 360,000 people—over 360,000 people to the Summerfest grounds at various times in the summer. And this results, we are told, in an economic infusion of $8 million to the Milwaukee metropolitan area.

This year the high cost of insurance could result in one or more festivals closing their operations and several others certainly reducing certain facets of their operation.

In my written testimony, I have listed here the increases of the costs for insurance at Irish Fest, and just now would like to point out that in 1984 we had $10 million worth of liability coverage at a cost of $3,106. In 1985, the same $10 million resulted in a cost of $24,500, an increase of 689 percent. This year, our preliminary estimate is that $10 million of liability insurance will result in our paying $65,000—which is an increase of 1,993 percent over the cost we paid in 1984.

Now, aside from the issue of cost, we have the issue of availability, and although Irish Fest has been fortunate in being able to have insurance since it began in 1981, and we are told that we will have insurance this year—or we hope to have insurance this year, at an albeit drastically increased price—Festa Italiana last year had some difficulty. I have here a survey that was done with various underwriters, 27 in fact. Eleven said they had no market in this type of coverage; 12, although they did have a market declined to quote; 4 actually did quote, 1 of them being so high that—the cost being so high and also so restrictive that it was not even considered a viable quote.

Now, what would happen if we lost the festivals in Milwaukee? I would say that definitely there would be a significant loss of tourism dollars and there would be a special effect on the hotel/restaurant industry in the city. I was told several months ago that summer in Milwaukee was a very low time for the hotel industry and now it is one of the best times of the year. And the people that I spoke with in the hotel industry felt that this was a direct result of the success of the festivals and the number of people not only attending the festivals from Milwaukee, but coming in from not only out of town, but out of State, and we feel that that is a very important, a very important point.

In another area, I would say that if we lost the festivals in Milwaukee there would be a decrease in the quality of life that we experience there. We are very proud of the ethnic festivals, and of Summerfest as well.

We are proud of our performing arts, our museums, parks and our zoo, and all these are factors which keep the people who live in Milwaukee happy and also draw people from out of State, not only

as visitors, but as employees of companies which decide to locate, to relocate in the Milwaukee area.

Thus, I believe that our festivals and the other ethnic festivals in Summerfest contribute to Milwaukee both economically and socially.

I remind you, too, that with respect to the ethnic festival, there are 10,000 volunteers working for improving the quality of life in Milwaukee and contributing to the economic stability of the area as volunteers. I think that Metropolitan Milwaukee and the State of Wisconsin can ill-afford to let any of these festivals go by the wayside due to the increase in insurance costs.

Thank you.

[The prepared statement of Mr. Maher follows:]

To the United States Senate

Committee on Small Business

Hon. Robert Kasten, Presiding

Written Testimony of John Maher

Chairman of the Board of Irish Festivals, Inc.

Submitted April 7, 1986

at

Green Bay, Wisconsin

Honorable Members of the Senate:

On behalf of the Board of Directors, coordinators, and volunteers of Irish Festivals, Inc., I would like to thank you for giving us an opportunity to share our experiences and views on the issue of liability insurance. If you have any questions pertaining to this testimony, I urge you to contact me at (414) 278-6032 in Milwaukee.

Background

Irish Festivals, Inc. is a non-profit organization which sponsors Irish Fest - a two and one half day festival featuring Irish music, song, dance, drama and cultural exhibits. The festival has been held on the third weekend of August since 1981 on the Summerfest Grounds in Milwaukee, Wisconsin.

The main goal of the festival is to promote the understanding of Irish culture. There have been many important by-products resulting from the achievement of this goal. These include the creation of jobs, especially among students, the availability of reasonably priced quality entertainment for families, and the promotion of tourism in the metropolitan Milwaukee area.

Irish Fest is a founding member of United Festivals of Milwaukee, Inc. - an organization comprised of five other ethnic groups which produce festivals on the Summerfest Grounds during the Summer. These are Afro Fest, Festa Italiana, Fiesta Mexicana, German Fest and Polish Fest. Most all of the goals as well as the problems which pertain to Irish Fest are shared by these other festivals.

Irish Fest attendance figures have increased steadily since 1981 (see next page). A 1983 study commissioned by World Festivals, Inc. - the producer of Summerfest and the administrator of the Summerfest Grounds - indicated that 37% of the total Irish Fest attendance represented visitors from outside the metropolitan Milwaukee area. The economic impact section of the same study showed that visitor spending associated with Irish Fest, in combination with spending from the five other ethnic festivals, resulted in an infusion of over $8 million in the community.

Year	Attendance	Percentage Increase Over Previous Year
1981	38,000 (est.)	Base Year
1982	42,108	11%
1983	50,940	21%
1984	62,010	22%
1985	69,325	12%

Insurance Premiums

Irish Fest liability insurance premiums have increased dramatically in recent years.

Year	Amount of Coverage	Cost Of Insurance	Percentage Increase Over Previous Year
1981	$ 2 Million	$ 2,035	BASE YEAR
1982	$ 2 Million	$ 2,035	0%
1983	$ 2 Million	$ 2,035	0%
1984	$10 Million*	$ 3,106	53%
1985	$10 Million	$24,500	689%

*In 1984, Irish Fest was required to obtain an additional $8 million in liability coverage.

Thus far, we do not have final quotes from our agents for 1986 liability coverage. However, one preliminary quote for $10 million in liability coverage puts the cost at $65,000 - an increase of 1,993% over the cost for the same amount of coverage in 1984.

Availability of Insurance

From 1981 through 1985, Irish Fest was successful in obtaining adequate insurance. Our agents believe that a $10 million policy can again be obtained, albeit at a dramatically increased price. Irish Fest's current contract with World Festivals, Inc. for the rental of the Summerfest Grounds requires a $10 million minimum liability coverage.

Increased Insurance Premiums/Effects on Festival Operations

In 1985 to accommodate the 689% increase in liability insurance premium, the Board was forced to make substantial cuts in the budget. This year, if price predictions hold, certain festival activities will be curtailed and ticket prices will probably be increased 20-25%. However, I can unequivocally state that, had the Irish Fest organization begun its first year of operation in 1986, the high costs of liability insurance alone would have caused the cancellation of the festival.

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The Role of the Government in Mediation

Certainly, the time has come for the Federal Government to mediate the insurance crisis. Although governmental intervention in the market place is generally undesirable, market conditions in the insurance industry cannot be allowed to stifle business development, upset existing business or deprive the public of the security of an insurance system.

There now appears to be broad public support for limits on awards for pain and suffering, a reduction of attorney contingency fees and a governmental mandate for quality underwriting procedures. These three issues must be equitably balanced to provide a solution to this most immediate crisis.

Respectfully submitted,

John G. Maher
Chairman of the Board
Irish Festivals, Inc.
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Senator KASTEN. Thank you very much for your testimony. I am going to begin with questions but I just want to point out to you and others in the room that there is a series of hearings that we are conducting, and although today our hearing is designed to listen to Wisconsin examples and to specific Wisconsin problems in order to bring Wisconsin examples and problems to the attention of the Nation. In our hearings in Washington, we have had representatives of the insurance industry, representatives of the industrial bar, representatives of the Bar Association itself, because the legal community is split on this overall issue. We have also been working with different groups of manufacturers, consumers, chamber representatives, small business representatives, and so forth.

So what we are doing is making an effort to draw upon the expertise and the information from as many possible groups as we can. Today's hearing is particularly targeted at learning more about specific problems in Wisconsin from the festival's point of view, from the EAA point of view and also from the small manufacturing point of view and the innkeepers' and restaurant owners' point of view.

Henry, in your testimony, you pointed out that home-built planes are suggesting—or suggested that home-built planes are kind of the cutting edge, were the leading edge of technology. There are many changes that occurred that are not necessarily coming from Rockwell in the very beginning, but from some of the smaller groups. From what you are saying I am left with the impression that if the present system continues, that some of these technological advances either may not go forward, or people would hesitate to go forward with them because they fear liability problems, or they would just be less likely to want to go on with improvements or changes. Could you comment on that overall question?

Mr. OGRODZINSKI. Yes, that is absolutely true. EAA members who build their own aircraft are able to take advantage of high technology and we are able to use it to a great extent, whereas many of the major manufacturers, for fear of increasing their products liability level, will not become involved, overtly, in working with perhaps unusual metals, perhaps composites such as fiberglass or epoxy, or unusual designs such as the Canard pusher.

In terms of the Canard pusher, there is a gentleman by the name of Burt Rutan, who has invented a series of aircraft—11, in fact, which are highly reliable, fuel efficient, very fast. These aircraft are very attractive.

He is a former NASA design engineer. He was able to take advantage of all this technology because he was not working for a large entity that restricted his ability to move into new and unexplored areas. As he explored these areas and as he tested these areas, he found many designs which have been very useful to all of us here.

Among the things he has designed is a New Generation Jet Trainer for the U.S. Air Force. He designed the Voyager, which is the only airplane capable of flying around the world nonstop, nonrefueled. That project will begin this spring. He has built the Starship for the Beach Aircraft Corp., which is the next generation of commuter aircraft. Burt got his start in the amateur-built aircraft movement. He has brought all of his airplanes to our convention.

The Voyager was here 2 years ago; the AD-1 which was used by NASA for high altitude wing research was brought here the year before.

Unfortunately, Burt Rutan has left the amateur-built area. He has told us quite candidly that the reason he has left the area is because he can no longer afford the liability insurance. For that reason he is no longer selling plans to amateur aircraft builders, he is no longer licensing suppliers.

We know of another gentleman who has invented a new wing for an existing aircraft which is superior to the wing in use now. The airplane would certainly be faster and more fuel efficient and probably safer than the current airplane. However, our technology is being artificially constrained, again, because of the state-of-the-art rule. He fears that by putting the new wing on an existing aircraft, he will prove, in effect, that the existing wing was defective. I know it sounds ridiculous when one applies common sense to it, but improving it to take advantage of the state-of-the-art would indicate that the original airplane was perhaps somehow defective. For that reason he dares not make that improvement and launch it into the aviation industry.

Senator KASTEN. Let me ask you to provide, for the record, the facts on that particular example because that is an important example and I think it is one of the most important concerns that our society ought to have, and that is that fear by the people that by improving their product, that the improved product becomes an example that the older product, or the original product, was being made unsafely.

We have this exact problem right now taking place in firearms with a Ruger pistol. The Ruger Firearm Co. is one of the oldest in this country and has a tremendous record of safety and success. In their efforts to improve a pistol, they changed the safe—they made it better. Now the new pistol is being used in court cases across the country to show that the old pistol was made unsafely. If you will, it is a disincentive to make these kinds of changes.

I would guess if we stretch it, the same thing could happen to you or to John or to others in terms of how you would change something at a festival grounds or how you would swing a certain way that you dealt with the jar company first, or whatever, and then if something happened in the old ones they would say they could have done it this way all along. But if you would, I would like to have that information because it is important that we get at many of those specific examples. The wing design example may be one that we can work through.[1]

Both of you said that you have had huge premium increases on liability coverage for your events while at the same time receiving less coverage. I think the numbers, if you just—you know, if everyone would just take a look at this chart that you have, John, showing from 1981 to 1985, in looking at the cost of insurance going from $2 million, $24 million, and then going to $675 million in the final years, it is just out of sight.

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[1] Information referred to is on page 841.

But you are being faced with the possibility of no coverage at all, and I would like specifically to address that. If there was no coverage at all, would there be a way of putting on the Irish Fest without insurance, or would the festival simply cancel? And I do not know if you can speak for the other groups as well, but I am not sure what the arrangement is. Do you have some kind of arrangement with the county or the Summerfest grounds that you must have a certain kind of insurance, or is there a provision for you being able to operate without insurance?

Mr. MAHER. At this time there is no provision for any of the festivals to operate without insurance. The Summerfest grounds, as you may know, come under a good degree of control of the city of Milwaukee and the board of harbor commissioners, and Summerfest itself has had insurance to cover its own operations. We rent the grounds from World Festivals, the producer of Summerfest, and they in turn require that we obtain $10 million in liability coverage.

If the market dried up tomorrow and we were faced with no insurance coverage, I think the issue would be put to the city of Milwaukee and I do not know what their response would be. But I would go to the city of Milwaukee first with the problem and ask them to assist. I do not know what their reaction is or would be.

Senator KASTEN. Let me ask the same question for the EAA. And I know you have a number of activities at the EAA because you have an ongoing museum; you have research and development and other kinds of things going on there in addition to that, and then you have the annual fly-in. It might be different for each of the three, but could you give the committee an understanding of what would happen if you were unable to get insurance coverage?

Mr. OGRODZINSKI. First of all, Senator, we have felt that the convention must be insured, that it would be unacceptable to have it uninsured because of our other assets. Because the EAA Aviation Foundation Museum, which is the year-round entity, because of the research efforts that you clearly pointed out, and some of the other work that we are involved in, to have our primary event uninsured—it would be impossible for us to have the event under those circumstances.

Our professional insurance coordinator, Mr. Harry Hanisch, who is with me here today, is going to London later this month in order to negotiate this year's insurance package for the convention. We, because of our—the expertise we have developed in the past year, or 2 years, involving products liability insurance, general liability, and working with the insurance industry, as well as having the knowledge and expertise we have in the aviation field, we feel confident that we will be able to obtain the insurance, but we shudder to think at what cost it will be available. And if it were not available, I really do not know what we would be doing.

Senator KASTEN. I would like to thank both of you for your testimony. We are going to continue to work with both of you. I want to say that we have made a real difference so far in terms of an awareness of people, people's awareness particularly from the small business community, and the consumer community, on the importance of some kind of a change in product liability insurance.

The fact that we were able, in the Commerce Committee, to get a 14 to 2 vote, Republicans and Democrats joining together on the Risk Retention Act Amendment means that we are starting to take a step in the right direction. But certainly we have not dealt with all the problems and we are going to continue to work with it.

I would like to say that in a State like Wisconsin, where 9 out of 10 jobs are provided by small businesses, in which tourism is one of our major industries, it is clear that we are being hurt terribly by the current runaway legal system, and unless we correct the problem, and correct it immediately, with an eye toward reform and other changes, our future is in doubt.

The time has come to put the brakes of this whole runaway set of problems that we have got and I believe that we can come forward to act.

I just would like to point out one other case, in terms of importance of this issue, dealing with our consumers. This is an important problem for our society in terms of what our responsibilities are to all of the consumers, what our responsibilities are to the people at the EAA, the ones that are not heard, as well as the ones that may unfortunately be injured in one way or the other. I do not know what your experience at Irish Fest has been, but my experience is there has been almost a minimum of any kind of liability suit over the years, maybe zero at Irish Fest. Is that correct?

Mr. MAHER. There have in fact, Senator, been three—all very minor and all occurring long prior to the increases.

Senator KASTEN. And my understanding is that that is typical in the number of the festivals there. But we have got a responsibility in our society to figure this problem out.

The best example, in my view, is the problem that we have today with the measles vaccine. Three years ago we had three or four different companies who were in the business of manufacturing and distributing a measles vaccine. Unfortunately, the measles vaccine, although it is 99.9 percent perfect, 1 out of 10 million people, statistically, has an adverse reaction to the vaccine. Now, over the last few years, one of them has gone to court and has settled for a huge amount of money, an amount so high that last year two people dropped out of the business of producing and distributing a measles vaccine. Our society today has one company in the business of distributing the measles vaccine. Their insurance expires this July.

We have a question as to whether or not we, as a society, want to end up with a system whereby 10 million people are going to end up being subjected to having measles because we cannot deal in our society with the problem of justly compensating that 1 person who is so unfortunate. It is almost as if it is an act of God kind of an accident that 1 person in 10 million—we can't find the way to justly and adequately compensate them without putting the entire measles vaccine manufacturing and distribution system at risk, and I think that we are going to work to deal with this.

I would like to, before I end this hearing, thank the people here in Green Bay. Mayor Sam Halloin was in the room a moment ago; I look forward to being able to visit with him before we leave today. But I want to thank you, everyone, for providing us with these facilities and for allowing the hearing to take place here.

That is a critical issue that is facing us, and not only in Green Bay and Wisconsin, but in the entire Nation. The hearing is recessed.

[Whereupon, at 11:05 a.m., the hearing was recessed to reconvene subject to the call of the Chair.]

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THE COST AND AVAILABILITY OF LIABILITY INSURANCE FOR SMALL BUSINESS

MONDAY, APRIL 14, 1986

U.S. SENATE,
COMMITTEE ON SMALL BUSINESS,
Eau Claire, WI.

The committee met, pursuant to notice, in Eau Claire, WI, Hon. Bob Kasten (acting chairman of the committee) presiding.

STATEMENT OF HON. BOB KASTEN, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KASTEN. The committee will come to order. This hearing of the Senate Small Business Committee is called to order. Today is one of a series of hearings that we have been having in Washington, DC, in the Senate Small Business Committee and throughout the State of Wisconsin.

A week ago we were in Green Bay, and we are going to continue to have this series of hearings continuing through the State. I might say that today I am chairing this hearing as chairman of the Small Business subcommittee entitled Entrepreneurship and Special Problems Facing Small Business. I am also a member of the Commerce Committee and the chairman of the Consumer Subcommittee of the Commerce Committee, and in that role, I have been working on product liability tort reform insurance.

What we are seeing here is an issue that is coming at the United States from a number of different directions, business and commerce, but a particular impact on small business.

We today, therefore, are having this hearing under the auspices—with the staffing from the auspices of the Senate Small Business Committee. We are focusing our attention on the liability insurance crisis, considered by many to be the number one consumer issue of our time.

Liability insurance is not only becoming more expensive, in some cases it is becoming impossible to get, or downright scarce. Even though I have been working since I was first elected to put some sense into the current hodgepodge of varying State laws and have had success in getting legislation through Congress on formation of risk-retention groups, Congress has been slow recognizing the depth of the liability crisis.

Today, everyone from the small businessman to local governments faces the same problem—finding affordable liability coverage. Small businesses across the Nation are closing their doors because they can't afford liability insurance.

In a hearing on this subject last week I referred to earlier in Green Bay, a tree service owner told how he may be forced to go out of business if just one claim of a number of claims that are before him now is awarded, simply because he could not get the level of liability protection he needs.

At the same hearing the representative of Milwaukee's Lakefront Festivals explained how some of these events might have to be cancelled because they can't get the necessary insurance. This is Summerfest, German Fest, Irish Fest, Festa Italiana, et cetera.

Meanwhile, thousands of cities and counties, including Eau Claire County, have been forced to "go bare," to go without insurance because they cannot get liability insurance at all.

How did we get to this point? How did our society get to this point? Although many factors are involved, most experts agree that the increasing number of huge damage settlements being awarded through our legal system over the past few years have been the driving force behind the huge increases in liability insurance costs.

As you can see from this chart,[1] product liability suits alone have increased in 1974 from 1,600—that is this number right here, 1,600 in 1974—we have seen an increase to 13,500 in 1985. We are talking about a 900 percent increase from here to here, a 900 percent increase.

The second chart is even more dramatic, and I think it is even more alarming. This chart is the number of million-dollar verdicts. Million-dollar verdicts have increased from 24—$24 million verdicts here, to over 400 in 1984. From 24 to 400. That represents a 1,600 percent increase during that period of time. We are talking about an increase of 1,600 percent in only 10 years. The rate of increase, as you can see, is even steeper.

I have introduced a bill in Congress to provide immediate relief for some of those affected by the current crisis. The bill amends my legislation, amends the Product Liability Risk Retention Act of 1981, so that any group, whether it is a small business, an organization, or a local government, can form a collective purchasing group, a risk-retention group, an interstate risk-retention group for general liability coverage.

This would make it easier for a group to obtain favorable rates, or also, make it easier for a group to self-insure. This legislation was approved with bipartisan support by the Senate Commerce Committee 2 weeks ago. The vote was 14 to 2 and is now pending before the full Senate. We are going to be pressing for quick action in the Senate, and with this kind of support, bipartisan support, I am optomistic that we will pass this legislation in the Senate, it will go over to the House, be passed by the House, and enacted into law.

It does not solve the entire problem. It is not a cure-all. Most of those suffering from the current liability crisis will only get the needed relief when Congress addresses the underlying cause of the problem.

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[1] Charts referred to on page 841.

The only way to get to the heart of the problem is for Congress to enact national liability reform legislation. I am pleased that the President is aware of the importance and now understands the importance of solving this crisis. I certainly welcome his support as he throws the weight of the Presidency, along with the Justice Department and the Commerce Department behind this product liability reform effort.

It is significant, because working with the President and the administration we just might have a chance of solving this crisis. We are in Eau Claire today to get an even better perspective on how various groups are coping with the current problems in attaining affordable and adequate liability insurance. We have representatives from many diverse groups, all suffering from the escalating proportions of this crisis.

Before we begin, I would just like to remind everyone here and others that are listening or are aware of this hearing, of a questionaire which we are making available. It is available here, and we have also used—working with a number of small business organizations in the State, we have used them to develop mailing lists so that we can send our liability insurance questionaire across the State, particularly to small business groups and to municipalities.

This questionaire asks, first of all, the kind of business you have, but then we are trying to get a sense of what is happening across Wisconsin, asking how much liability costs have increased; whether your insurance has been terminated; what kinds of problems you are having. This in order to get, in one place, a record of the history we now have in Wisconsin on this overall liability questionaire.

So I am hopeful that everyone here will fill out one of the questionaires, and also, that as many people as possible will respond when they receive this questionaire in the mail. We are all suffering from the escalating proportions of this crisis, but what I want to try to do is to work to codify or to summarize all of this information so that we can then go forward with the facts.

Also here today, I would just simply like to thank the city, but particularly Eric Anderson, the city manager of Eau Claire, for his help, for the hospitality in helping to make arrangements to hold this hearing in these chambers this morning.

As we begin with our first witness panel, I want to let them know that their entire written statements will be included in the official hearing record as if read. We would ask that all the witnesses summarize their remarks, limit their remarks to basically 10 minutes or so—a little bit more, a little bit less—so that there will be an opportunity for questions.

Our first panel includes Miss Barbara Smith of Eau Claire and Mr. Donald McKay of Portage. Both witnesses will present their testimony before I ask questions of either of the witnesses.

We will begin with Barbara Smith, who is the president and the owner of B.J. Tweeds Restaurant in Eau Claire, as well as the owner of three other Eau Claire area restaurants.

We welcome you to our committee, and I just might say that I enjoyed having dinner at one of your restaurants last night, and I hope very much we are going to be able to solve the product liability crisis because I hope very much that restaurants, such as the fine one that we had dinner in last night, are able to continue to

serve such fine food to people not only from Wisconsin, but to people who come to Eau Claire from all across the country.

We welcome you here today and look forward to your testimony.

STATEMENT OF BARBARA J. SMITH, PRESIDENT, B.J. TWEED'S RESTAURANT, EAU CLAIRE, WI

Ms. SMITH. Thank you, sir, and good morning. It is indeed a pleasure to be here this morning. I want to thank you, Senator Kasten, for this opportunity to participate in this hearing. I want to share my concerns and those of other small business owners in western Wisconsin and throughout the State over potentially the greatest problem confronting small business at this time, liability insurance.

For discussion purposes and proper perspective, it should be noted that I own and operate four restaurants in western Wisconsin and employ approximately 120 people. It should also be noted that I am painfully acquainted with the subject since my total insurance package just came up for renewal.

This issue became intensely personal when I saw firsthand what it could do to a small business. The issue is multifaceted but can be summarized, from my viewpoint, into three major areas.

First, lack of availability of liability insurance; second, skyrocketing costs; and third, both of these issues could cause bottom line detrimental effects and business closings.

So look back, first, at lack of availability of liability insurance. My independent insurance agent, who is also a small business owner, has worked diligently with me for years. He solicited bids this year. In 1985 14 companies had bid on my insurance. In spite of an excellent claims history, eight of those companies refused to bid in 1986. They wanted to remove themselves from this highly unpredictable market. They were not even interested in talking with us, and as you can well imagine, the ones who did offer bids were not very competitive in price or terms.

In the past I have been given attractive terms. In 1986 the initial deposit premium was to be $12,000 with steep monthly payments. As you can well imagine, I do not have $12,000 just sitting in a drawer waiting to be paid.

This deposit was not affordable, and the premiums were far above my budgeted forecast. Of the six who did submit quotes on my total package, none would sell me liquor liability insurance. Please remember that two of my restaurants are fine dining establishments and rely heavily on liquor and wine sales. Their refusal to sell me this insurance certainly added insult to injury.

This liability crisis could threaten the very viability of the hospitality industry, which is the tourism industry, which is vital to our State's economy.

Now to view the next facet of this all-important issue–skyrocketing costs. OK. So it is more difficult to obtain liability insurance. But if you do not obtain it, your next shock is the dramatic increase in cost.

In a recent Wisconsin survey of the National Federation of Independent Business, which, by the way, has 200 members in Eau Claire and over 12,000 members in Wisconsin, 90 percent of its

members had liability insurance rate increases of 50 to 1,000 percent. The increases forced 32 percent of them to decrease coverage or raise their deductibles. The most alarming statistic was that 6 percent of the small businesses surveyed had to drop their liability insurance completely.

When I renewed our own policy, my agent and I carefully reviewed all coverages. I raised deductibles. I cancelled parts of my policy. In fact, I left only coverages that are contractually required in two of my operations that are leased. I am now underinsured, and I feel bare, and I do feel vulnerable.

I am not alone. When I polled local restauranteurs, I found that 70 percent of them are in the very same situation. It is throughout our industry.

Our egg supplier reported to me that her insurance had tripled in the last three years. A long-haul trucker in our area says that his premium went from $54,000 to $114,000. Again, let me emphasize, this is indeed a crisis situation.

Now, to move to our next point—business losses and business closures. If we as small business owners continue to absorb these dramatic cost increases, it will indeed wipe us out. In my highly competitive business, and I am at the top of the line in our market, and I am already priced higher than most of my competitors, I do not have anyplace to recoup these. I certainly cannot recoup insurance costs through my menu pricing. It is just not possible. It is having a harmful impact on my industry and on my business in particular. If we keep adding to our cost, we will price ourselves out of the market.

Furthermore, owners of small businesses face problems beyond the question of availability and cost. For example, if a bank finds a company has lost its liability insurance, they may not renew loans. This could be extremely detrimental to the pursuit of new products and new services, or both. We entrepreneurs are risktakers, but the extreme hardship that the dramatic increases in premium payments or the ability to even gain coverage will certainly dampen the entrepreneurial spirit.

In summary, small business, as you know, is tough on its best day. In my industry the return is only 3 to 8 percent by healthy, independent operators. In Wisconsin, the Wisconsin Restaurant Association tells me it is 1½ to 3 percent return. Of 600,000 new small businesses in the country, 50 percent fail within 2 years.

You know, also, that 110 million people—48 percent of our population—are directly involved in small business. Of the new jobs created in the last 10 years, 66 percent have come from small business. So when a problem such as this important liability issue is so devastating to small business, it does become important to us all.

Solutions: Certainly, while I have studied the issue, I am not as learned as you on this subject, but I know that the issue strikes at the very core of small business. After studying the issue, I do agree with various proposed solutions that include caps on awards and limiting attorney's participation in the award. However, more than anything, I feel that we need to restore balance to the system. I encourage you to determine the appropriate solution and to see to the implementation of the reforms to the system.

The reform should work effectively on behalf of persons who deserve to be compensated, companies that need liability coverage, and companies that provide it. Yes, restore balance to the system.

Again, my thanks to you, Senator Kasten, for your time and attention. I certainly look forward to see the results of your efforts.

[The prepared statement of Ms. Smith follows:]

STATEMENT OF BARBARA J. SMITH

It is indeed a pleasure to be here this morning. I want to thank you, Senator Kasten, for this opportunity to participate in this hearing. I want to share my concerns -- and those of other small business owners in Western Wisconsin and throughtout the state -- over potentially the greatest problem confronting small business at this time -- liability insurance.

For discussion purposes and proper perspective, it should be noted that I own and operate four restaurants in Western Wisconsin and employ approxiamately 120 people. It should also be noted that I am painfully acquainted with the subject, since my total insurance package just came up for renewal. This issue became intensely personal when I saw first hand what it could do to a small business.

The issue is multi-faceted but can be summarized from my viewpoint into three major areas:

(1) Lack of availability of liability insurance.

My independent insurance agent, who has worked diligently with me for years, solicited bids. In 1985, 14 companies had offered quotations to insure my company. In spite of an excellent claims history, eight of those companies refused to bid in 1986. They wanted to remove themselves from this unpredictable market. They were not even interested in talking with us, and -- as you can well imagine -- the ones who did offer bids were not very competitive in price or terms. In the past, I had been given attractive terms. In 1986, the initial deposit premium was to be $12,000 with steep monthly payments. The deposit required was not affordable to me, and the premiums were far above my budgeted forecast.

Of the six who did submit quotes on my total package, none would sell me liquor liability insurance. Please remember that two of my restaurants are fine dining establishments that rely heavily on bar and wine sales. Their refusal to sell me this insurance added insult to injury. This liability crisis could threaten the very viability of the hospitality industry.

Now to view the next facet of this all-important issue,
(2) Skyrocketing costs.

I saw first hand that it's becoming more and more difficult to obtain liability insurance. If you do obtain it, your next shock is the dramatic increase in cost.

In a recent Wisconsin survey of the National Federation of Independent Business, which has 200 members in Eau Claire and 12,340 members in Wisconsin, 90% of its members had liability insurance rate increases of 50% to 1000%. The increases forced 32% of them to decrease coverage or raise their deductibles. The most alarming statistic was that 6% of the small businesses surveyed had to drop their liability insurance completely.

When I renewed our own policy, my agent and I carefully reviewed all coverages. I raised deductibles. I cancelled parts of my policy. In fact, I left only coverages that are contractually required in two of my operations that are leased. I am now under-insured and feel very bare and vulnerable. I am not alone, however. When I polled local restauranteurs, I found that approxiamately 70% of them are in a similar situation.

In fact, it is throughout our industry. Our egg supplier reported to me that her insurance has tripled in the last three years. A long haul trucker in our area says that his premium went from $54,000 to $114,000.

Again, let me emphasize. This is a crisis situation!

Now to move to our next point:
(3) Business Losses & Business Closures.

If we as small business owners continue to absorb these dramatic cost increases, it will wipe us out. In my highly competitive business, I have no place to recoup these ever escalating cost increases. This issue has had an extremely harmful impact on our industry. If we keep adding to our costs, we will price ourselves out of the market.

Furthermore, owners of small business face problems beyond the question of availablity and cost. For example, if a bank finds a company has losts its liability insurance, they may not renew loans. This could be extremely detrimental to the pursuit of new products or new services.

Entrepreneurs are risk takers, but the extreme hardship that the dramatic increases in premium payments or the inability to ever gain coverage will thwart the entrepreneurial spirit.

In summary, small business is tough on its best day. Of the 600,000 new small businesses, 50% will fail within 2 years. You know the difficulties a small business encounters. You also know that 110 million people -- 48% of our population -- are directly involved in small business. Of the new jobs created in the past 10 years, 66% of them were from small business.

When a problem such as this important liability issue is so devastating to small business, it becomes important to us all.

Solutions?
While I have studied the issue, I am not as learned as you on the subject, I do know that the issue strikes at the very core of small business. I do, however, agree with various proposed solutions that include caps on awards and limiting attorneys participation in the award.

However, more than anything, we need to restore balance to the system! I encourage you to determine the appropriate solution and to see to the implementation of the reforms to the system. The reforms should work effectively on behalf of persons who deserve to be compensated, companies that need liability coverages, and companies that provide it. Yes, restore balance to the system!

Again, my thanks to you, Senator Kasten, and your distinguished associates for your time and attention. I look forward to seeing the results of your efforts.

Senator KASTEN. We are going to continue to struggle on together. Thank you for being here and for your very important testimony.

Our next witness is Mr. Donald McKay, who is the business manager of Cascade Mountain, Inc., a ski area. I think all of us are familiar with it, but it is a ski area which is just outside of Portage.

Mr. McKay, we welcome you to the committee, and we look forward to your testimony.

STATEMENT OF DONALD McKAY, BUSINESS MANAGER, CASCADE MOUNTAIN, INC., PORTAGE, WI

Mr. MCKAY. Thank you very much, Senator Kasten. I want to thank you for the opportunity to be here to express our views on the insurance situation. Probably our views are somewhat repetitive of everbody in the small business community.

Cascade Mountain is a medium-sized ski area in Wisconsin, probably small compared to many of the areas in the United States. During the last year, in particular, not only the rising costs of insurance, but the availability of any insurance at all, has become a very real and major concern. I think that our insurance premium increases are probably typical of most ski industry operators today.

Between the period of 1982 to 1985 our premiums ranged between the $30,000 to $35,000 range. Our premiums for the 1985–86 ski season were $130,712. That is a whopping 340 percent increase, and it is not over yet. Our insurance premiums are based on our gross dollar receipts, and when the actual audit is accomplished, we will be getting a bill for probably another $20,000 or $30,000.

So we will be up in the 400-percent increase range for this year. We had an idea that premiums were going to be raised. Obviously, it has been a concern for a long time now in the news media and within the industry. We have attended many seminars and insurance risk-management sessions where the premium rates have been discussed. The National Ski Areas Association has just completed a study on the possibility of doing an insurance captive, and so we expected it. We raised our rates accordingly in advance, but we had no idea it was going to be this much. More than $1 for every lift ticket that we sell goes to insurance premiums.

Not only were we faced with increased rates last year, but the availability is very limited. When I started seeking insurance coverage for renewal last October, there were only three companies that we knew of that insured ski resorts. One is out West. They will not write in the Midwest at all. One company has declined now to write any ski resort business whatsoever. A third company, which we are with now, fortunately, accepted us at the last minute because we have an excellent claims record.

Several ski areas that stayed with our previous insurance carrier were able to obtain general liability coverage with no umbrella, and with only a $300,000 to $500,000 limit. With the number of million-dollar verdicts that you have pointed out earlier, obviously that is not enough. We were just very fortunate. Our insurance agent said to change our policy effective date to October 31, because on November 1 the insurance company will be renegotiating rates, and they are going to go up. We took his advice. Our insur-

ance rate was 6½ percent. I called 2 days later, and he said, "If you'd have waited, it would have been 11½ percent." In just 2 days rates would have doubled.

I think this is what we are looking at again this coming October—another whopping increase. Our premiums are due up front. Believe me, November 1 is a tough time to pay a $130,000 insurance premium when you have not had any income in 6 months.

However, some good has come from this exceptionally high insurance rate and the increasing awards given for claims. Within our industry a great deal more emphasis is being placed on risk-management, on skier safety and skier education. I think that the insurance situation has forced the industry to take a much closer look at how we operate, the equipment that we use, and the facilities that we provide for skiers. And I think this is a very positive benefit of the increased insurance rates.

There is much more information available to us as ski area operators now on risk-management and engineering design. The insurance companies actually provide a much stiffer safety inspection than do the local State governments. I think that in some cases the recreational business is very different from manufacturing and some other businesses. We deal with a lot of uncontrollable factors such as the weather and the natural environment, things that we can't control.

I can really only speak for Cascade and the immediate community surrounding us, but I am sure it is the same with any other ski resort or winter recreational business. If we are unable to obtain sufficient insurance coverage, or if it is expensive and we cannot pass the costs along, obviously we are not going to be open.

The Portage and Wisconsin Dells area is largely agricultural and summer recreation-oriented. Cascade Mountain provides an off-season buffer. We employ over 150 people during the winter. We purchase many thousands of dollars of local goods and services, and we bring in a large volume of visitors to the area.

Last year over 100,000 people came to the Portage area, over 60 percent from out-of-State, to ski at Cascade Mountain. Our lodging service alone booked more than 2,300 room at local motels. Many more rooms were obviously filled that we did not book.

If the insurance market continues to tighten up, it is going to effect not only our business but the other community businesses. As we see it, the solutions to the insurance dilemma will not be easy nor quick. The trend of high awards by juries is not likely to change on its own. It seems that with the nature of society today, that more and more people are looking for the easy buck. Look at the success of State lotteries. Everybody is willing to invest a small amount for the big win. I think they look at that, from the insurance companies, with a deep-pocket approach, or the faceless corporation thinking that for a small investment, they can come out the big winners.

The solution lies in several areas, especially by education or law. People have to become more responsible for their own actions. In some States the skier's responsibility code or a variation thereof has been made law. I do not think that anyone wants to see someone not rewarded if a business owner is actually negligent, but accidents do happen or problems come up, and an individual just has

to assume some responsibility for himself and his actions. We can not always protect a person from himself.

I think a good case in point, we have been very fortunate in our claims history at Cascade Mountain, but just a few days ago I received a letter in the mail from an attorney. I presume—it did not actually say—that he was representing a skier who was injured on our slopes, yet he did not say what the injury was, or the extent of the injury. It just said we hereby claim one-third of anything this person gets from you or from your insurance company.

Now, I mean it seems a little silly that this attorney is more concerned about his one-third premium than he is about the actual client that he is representing. I presume one of these days we will get some claim for the client, but in the meantime, we got the claim from the attorney.

I think we need to eliminate that kind of fee structure. If an individual was being charged a flat rate or something similar, that a lot of the nuisance suits or fishing expedition suits would be taken out of the courtroom. It is not only whether a claimant wins or loses, it is the cost for the company of actually fighting it in court.

Third, I think it is possible that we need to set limits on awards for punitive damages, personal pain and suffering, and maybe the total liability awards. If there were limits on the awards, the insurance company would know the limits to which it might be paying, and compare its rates schedules, its claim structure, and so forth, accordingly.

There are two other concerns within the ski industry. We need to prevent insurance companies from going to a program called claims made insurance method. We feel this would restrict the competitive nature of the insurance business, since an insurance company would only be able to accept those claims filed while it is your actual carrier. Obviously, with the long-term ability of people to come back 3 or 4 or 5 years after the incident to file a claim, you would be very reluctant to change carriers if you thought that a claim might be coming a year or two down the line that you would be on your own with.

Another concern is joint and several liability. Most States have comparative negligence. If a jury determined that a skier ran into another skier and was 98 percent at fault and the ski area was only 2 percent at fault, it would seem that the skier or his insurance company would pay the 98 percent and the ski area would pay the two percent. But if the ski area had insurance and the skier had no insurance at all, it could fall back on the ski area's insurance to pay as much as 100 percent of the claim.

We feel this is totally unfair and that the person or company should only be liable for its own degree of negligence.

In conclusion, Cascade Mountain, like most small businesses is trapped between a rising cost of doing business, insurance rates, and an uncontrolled legal system that is growing rampant with increased liability claims and skyrocketing awards. It is rapidly reaching a point where we cannot afford insurance, nor can we afford to be without it. The only alternative is to cease doing business, a choice no one feels is satisfactory. We, as a business and industry, are trying to do our part in providing a quality resort, well-designed and maintained, with a reasonably hazard-free environ-

ment without limiting the freedom of expression that makes skiing an exciting and enjoyable experience. It is time for people to begin to take responsibility for themselves and their own actions. We cannot legislate that.

[The prepared statement of Mr. McKay follows:]

STATEMENT OF DONALD H. McKAY, CASCADE MOUNTAIN, INC.

INTRODUCTION AND CASCADE'S SPECIFICS

Cascade Mountain Ski Area is a medium sized resort located near Portage, Wisconsin in South Central Wisconsin. During the past year in particular, not only the rising cost of insurance, but even the availability of any insurance at any price has become a very real and major concern.

At Cascade Mountain, liability insurance premiums have taken a major increase over the past year. The following chart explains it all:

Ski Season	Total Insurance Premiums
1982-83	$ 33,976.00
1983-84	$ 28,434.00
1984-85	$ 38,437.00
1985-86	$130,712.00*

* 1985-86 premiums will be even higher when we pay the balance due after the sales audit.

As you can see, insurance costs have gone up a staggering 340%. Even though we had an idea that the premiums would be increasing and therefore, raised our ticket rates in anticipation, we had no idea that it would be this much! The cost of insurance is now our second largest expense next to payroll. More than one dollar from every lift ticket sold goes to insurance premiums.

Not only were we faced with increased rates but we were lucky to find coverage at all. We changed companies at the last minute to the only company we know of that would write an umbrella coverage. We were only accepted because of our excellent claims record for the past three years. Areas with poor records are having policies cancelled or they are just not accepted at all. Several ski resorts in Minnesota who stayed with our former agency were only able to obtain a $300,000-500,000 general liability coverage and were left to operate without umbrella coverage. Of the two or three companies who used to write coverage in the Midwest, one, Petit Morrey (representing Lloyds of London) will not write any more in the Midwest; Transit Casualty has withdrawn completely from writing ski resort coverage, leaving only one major supplier, American Home.

Also relative to rates, we changed companies on October 1, 1985 and on November 1, 1985 the rate structures changed.

We were fortunate to be at a rate of 6.5% of receipts, yet other ski resorts are now being quoted rates as high as 11.5%. Obviously when we look for renewal next October, we are anticipating another substantial rate increase. We expect to have to raise our lift ticket rates another dollar just to cover the additional insurance costs.

EFFECT ON INDUSTRY

Some good has come from the exceptionally high insurance rates and increasing awards given for claims. A great deal more emphasis is being placed on risk management, skier safety, and skier education. The ski industry as a whole, largely through the National Ski Area's Association has been doing extensive promotion campaigns to educate the skiers and the general public to the inherent risks in the sport and their responsibility to "Be Aware - Ski With Care" and "Ski Safe - Ski In Control".

Ski area operators are having many more seminars and more information is available to assist them in assessing various risks and/or hazards on the ski slopes that may be controlled without reducing the thrill and enjoyment of the skiing experience. Engineering inspections by the insurance companies are often much stricter than the State or other governing bodies, and incorporate not only equipment inspection but slope layout, fencing, signage, and other areas that may help reduce skiing related injuries. With the continuing decline in the number of companies offering insurance coverage, the ski resort operators who fail to comply with relatively high standards of safety are or will find themselves without coverage.

I can speak only for Cascade and the immediate community surrounding us, but I am sure it is the same with any oter ski resort or winter recreational business. If we are unable to obtain sufficient insurance coverage, the cost will become so high as to prohibit us from passing the cost along and still have customers and therefore, we will probably not be open for business. The Portage and the Wisconsin Dells area is largely agriculture and recreational in the summer. Cascade Mountain provides an off-season buffer, employing over 150 people; purchasing many dollars of local goods and services; and bringing a large volume of visitors to the area.

This past year, over 100,000 skiers, of which more than 60% came from out of state, visited the Portage area. Our Lodging Service booked more than 2300 rooms at area motels (most of which were two or three night stays). Many more were booked directly with the motels. It is obvious then that the tight insurance market could have a major impact on the local economy, not only for Cascade Mountain and

Portage, Wisconsin, but anywhere in the U.S.A. where recreational businesses are forced out of business because of the lack of insurance.

SOLUTIONS

The solutions to the insurance dilema will not be easy nor quick. The trend of high awards by juries is not likely to change on its own. The fact that many of our state and federal legislators are lawyers themselves and tend to listen to the "legal" lobbiest and who are obviously adverse to creating a change in the legal "fee" systems. It appears that with the nature of society today that more and more people are looking for the "easy buck", if not by lotteries, then maybe by the "deep packet" of the insurance companies or the faceless corporation.

I believe the solution lies in several areas, especially by education or law. People have to become more responsible for their own actions. In some states, the "Skier's Responsibility Code" or a variation thereof has been made legal in twenty eight states.

I don't believe anyone would argue that if a land owner or recreational facility operator, whether it be a ski resort or a water slide park, should be liable if they are truly negligent in their operations, but accidents do happen and nobody plans them. An individual has to assume responsibility for himself and his actions. Another person or business cannot always protect a person from himself.

When a person decides to go skiing, they are assuming a certain amount of risk. Part of the "thrill and excitement" of this sport is the risk and challenge of man against the mountain.

Second, we need to eliminate the practice of trial attorneys receiving a percentage of award for services rendered. If an individual is being charged a flat rate or by the hour, they are much less likely to take "nuisance" suits or "fishing expedition" claims to court. Furthermore, if a claimant loses, he should be liable to pay the costs incurred by the defendant.

Third, it is possible that we need to set limits on awards for punitive damages, personal pain and suffering, and the total liability which are escalating with every verdict. Part of the problem is the uncertainty by the insurance companies. If an insurance company knows the limits to which it might be paying, it could plan and prepare rate schedules accordingly for typical claims.

We also need to prevent insurance companies from going to "claims made insurance method", in which case the insurance company will only accept those claims filed while they were your carrier. They will insure as long as requested, but if a change is made to another insurance company and a claim is filed from the time period covered by the original carrier, the insured is on their own. This reduces the competitive possibilities in the market place because a business would be hesitant to change and have to accept claims liability. They would instead be trapped with rates that may or may not be competitive.

Another concern is "joint and several liability". If a jury was to determine that a skier who ran into another skier was 98% at fault and the ski area only 2% at fault (comparitive negligence) it would seem that the skier or his insurance company would pay 98%. If the skier had no insurance, it could fall back on the ski area's insurance to pay as much as 100%, even though the ski area was only 2% at fault. I feel a person/company should only be liable for his own negligence. Both of these last two concerns should be important considerations when drafting future state and federal laws or policies.

CONCLUSION

Cascade Mountain, like most small businesses, is trapped between a rising cost of doing business (insurance rates) and an uncontrolled legal system that is growing rampant with increased liability claims and skyrocketing awards. It is rapidly reaching a point where we cannot afford insurance nor can we afford to be without it. The only alternative is to cease doing business, a choice no one feels is satisfactory. We, as a business and industry are trying to do our part by providing a quality resort, well designed and maintained, with a reasonable hazard free enviornment without limiting the freedom of expression that makes skiing an exciting and enjoyable experience. It is time for people to begin to retake responsibility for themselves and their actions.

Senator KASTEN. Thank you very much for your testimony. Let me begin with questions to Ms. Smith. It is clear from your testimony that you have had some, you know, terrible personal experiences in obtaining adequate and affordable coverage, and I do not mean that yours is not worse. You look at the chart in terms of the increases that you provided to the committee—but anyway, you right now have decided to go with the minimum coverage, basically, that your landlords are mandating. It sounds to me as if you are close to the edge and that I would just want to speculate if you had a major claim, my understanding is that your claims history has been almost perfect. So these increases have been coming in spite of the fact that you have not been having claims and have not been going to your insurance company.

Nevertheless, you are seeing these increases. If you now, under the circumstances that you find themselves, had a major claim, what effect would that have on your businesses?

Ms. SMITH. Well, one major claim could result in my closing one of my businesses, definitely.

Senator KASTEN. That would mean——

Ms. SMITH. Well, it would mean a loss——

Senator KASTEN [continuing]. A number of people who were employed that——

Ms. SMITH. Right.

Senator KASTEN. It goes right through the whole system?

Ms. SMITH. Right.

Senator KASTEN. You mentioned that you polled many other restauranteurs in the area. In our hearing in Green Bay we worked with someone that was part of the innkeepers group, but I have talked to a number of people that are in your businesses, people like Bernie Shreiner, and some others that have been—and are—very concerned about the overall directions that we are going in.

What does this mean? When you think of the importance of tourism in Wisconsin, you think about the importance of the restaurant business and innkeeping business to overall tourism, what are we talking about when we look to the future for Wisconsin?

I understand that your business—your kind of business is among the most risky to get into already since a large number of small businesses fail in the first year and particularly a large number of restaurants fail in the first year. What are we talking about when we are looking at the future?

Ms. SMITH. It is a high-risk business. As I stated before, we only have a 3 to 8 percent return if we are extremely healthy. Definitely, the hospitality industry is one of the most important parts of tourism. It is going to cause people to close. It is dampening our entrepreneurial spirit. We can just no longer afford to take the risk. The risks are becoming too high.

Senator KASTEN. What about a potential—a person that was about to graduate from college or has been working his way through—or his or her way through a school and also working in a restaurant, part-time or almost full-time, and he or she is about to make a decision to go out on their own and start a new restaurant, how does the liability insurance crisis affect an individual that would be about to go into a business such as the ones that you have?

Ms. SMITH. Why, I—it just makes it unaffordable. It is unaffordable at this time. When you think about—that my insurance exceeds $24,000 a year, how many filet mignons do I have to sell to even cover my insurance? It is representing about 3 percent of my sales at this time, and when you look at the return being about 1½ to 3 percent in this area at this time, the insurance is just—is one of the issues that is gobbling up our bottom line.

Senator KASTEN. You know, when you stop and think about how you can afford the insurance, that is exactly why at other hearings we have had information coming to us from New York State, in particular, where the medical practice in New York State is now in virtual chaos. An OB/GYN in New York now has to pay $140,000 for his insurance, and they testified—when you said how many filets do I have to serve, they testified—I mean you stop and think about how many babies they would have to deliver in order just to pay their insurance, and then they have to pay for their office and their nurse and the other, we are building a system here which is just unreasonable, and I think that your example is good.

Mr. McKay, you currently have liability coverage even though your actual coverage has decreased, if I understand it. Your dollar coverage has decreased, but your premiums have been going up, but you have, as of today, liability coverage. Do you see a day when insurance companies are not going to be willing to assume any of the risks for ski areas, especially when you look at some of the risks that are involved? Do you see a possibility, at least, of people just saying they are not going to insure ski areas?

Mr. MCKAY. I believe more than everyone, every insurance company says, no, we won't. I believe what we will find is that the deductibles will get higher and higher, or the part that the business has to pay itself before the insurance company coverage kicks in.

Already there are only two companies providing umbrella coverage for over 600 ski areas in the United States. One is Lloyd's of London and the other, the American Home Insurance Groups. They have stayed with the ski areas for quite a number of years, although other companies have come and gone. I do not believe they are going to pull out.

Senator KASTEN. Is your National Trade Association making any moves? You mentioned in your prepared testimony that you have been having meetings about this. Could you just explain to the committee, is your National Trade Association making any efforts or moves toward some kind of group self-insurance, getting together, forming a risk-retention group, whatever it might be?

Mr. MCKAY. Yes; I think I stated that they just completed a study of forming an insurance captive for the industry. However, the rules of that would state that even though you were a member of that captive, you were not necessarily guaranteed insurance coverage. I do not think the results are completely published yet, but the results have indicated that it is not economically feasible at this point to form a captive.

Senator KASTEN. One of the things that we are working on in the legislation that I have referred to in my opening testimony was the Risk Retention Act Amendments of 1986. Those amendments, that bill—the changes in the 1981 Risk Retention Act, which is incorporated into my legislation, could have an effect on what you are

doing. Our legislation was brought forward largely because of groups that were the next step beyond where you are, unable to get anyone to cover them. Nurse midwives were one example, day-care centers were another example, and certain municipalities were a third example. There was nowhere, Lloyd's of London, wherever, that they could go. What we are doing is allowing them to group together, to broaden their base, if you will, so that they can afford to form risk-retention groups, and that is the legislation that is passing.

I am a skier, and I have skied at Cascade Mountain, I have skied in the West, I have skied throughout Wisconsin and upper Michigan. I have always known the risks that I was taking. And I have seen, in most ski areas, a growing number of signs, and in certain cases the waivers; the small print on the back of the ticket has been getting smaller and smaller; and more and more work being done at explaining to me that I am voluntarily assuming some risks.

With all these warnings and with all these claims, what effect do these have in the law? Or are you telling me that all the warnings, the signs, the squares, the dots, the arrows, the intermediate rankings of the slopes and all the other things that you are doing, are these warnings basically useless, do you find when you are faced with a legal suit?

Mr. McKAY. I think, for the most part they are not very useful because everyone will step forth and say:

> Well, I did not read the fine print before I signed my name on the ski equipment rental release agreement. It was not in bold enough print. I have to wear my glasses when I read, and I did not have my glasses on when I was skiing or something like that.

Experience has shown, that we as a business, need to protect ourselves in as many ways as possible from liability. Yes, there are the disclaimers and the signage and that sort of thing, but more and more we have to take a closer and closer look at our ski area; try to do things from a skier's, a nonskier's, and an advanced skier's point of view; look at each individual trail, slope, tree, post, or whatever it is, whether it be a bump in the snow, or a ridge, and say:

> If I am a skier and I am negotiating this, is this a hazard that I can avoid if I am skiing under control? Or is it something there that the ski area put there intentionally trying to trip me up?

So we are taking a lot closer look at our operations every day, trying to smooth that out. But, obviously, I think one case in point is the snow-grooming equipment that we use is becoming technologically more and more proficient in providing a nice, smooth, almost ripple-free snow skiing surface.

Senator KASTEN. So now the mogul is going to become a danger?

Mr. McKAY. The mogul becomes a danger. On the other hand——

Senator KASTEN. That you could have dealt with, they will say?

Mr. McKAY. Right. If you do not buy the latest in equipment for $133,000 for a new grooming machine, and you continue to have ridges and bumps on your slopes, it is a hazard.

On the other hand, by providing a smooth, flat surface, the speeds increase. How would you like to hit a tree at 30 miles-per-hour? Well, how come you did not move that tree? Well, the tree is a naturally growing obstacle. But here is a chair-lift tower that is 24 inches in diameter, and it is bright yellow compared to this dull gray tree that is 3 inches in diameter, but if they hit the tower, you put the tower there.

So what we are really trying to get into now is skier education, to educate people that there are risks in the sport and that they are assuming a certain amount of that risk. We want them to go out, and we want them to enjoy the environment and have fun, we do not want to take away all their fun, either.

Senator KASTEN. Well, you entitled your testimony here the Dilemma of Insurance—the Statement of Insurance Dilemma by Cascade Mountain, and, of course, that is exactly what you just described. You look at these premiums going up to $130,000. I used to be a small businessman before I got involved in government and politics. We manufactured shoes. I want to just ask each of you, and I will ask you both to reply to the same question.

We will begin with you, Ms. Smith. One of the things that frustrated me in business was the rules, the regulations, the paperwork, just the redtape, and, frankly, we get frustrated sometimes. I just wonder if it is all—you know, is it all really worth it? And as I am sitting here listening to your testimony, I just want to ask you kind of a broader question. Do you just kind of, you know—some night you are closing up your restaurants and probably have to stop in at one or two of the others, and all of a sudden it is 11 or 11:30 at night, and you are just getting off of work. You stop and think about insurance premiums going up, it is just one more burden. I believe in small business. I believe in the American dream. I believe in the rewards of running our own business. But do you get a sense that some of the rewards as a result of this, along with other kinds of problems, are getting less and some of the burdens are getting greater?

Ms. SMITH. Yes, sir. On Easter Sunday, after working 14 to 16 hours that day, I went home and I swore that the next day I would sell all of my businesses, that the rewards simply were not worth it. A friend said, "Why don't you go to bed and think about it in the morning." I am a typical entrepreneur in that I like to take risks. I enjoy the personal gratification that you get from seeing your own ideas implemented. But the risks have become more and more, and I no longer look at my businesses through rose-colored glasses that I did at one time. I am more of a realist now.

Senator KASTEN. Mr. McKay.

Mr. MCKAY. Well, I think the redtape and problems are part of doing business that we have to accept. The question—really the whole thing is, if you are afraid of hassles, you do not want to be in business. You cannot have a hassle-free business. It comes down for the business to the bottom line. When the costs get to a point where there is no way that you can recoup them and your bottom line starts to go into the red, then it is time to change businesses.

Senator KASTEN. I would like to thank you both very much for taking the time to testify before the committee. We look forward to

continuing to work with you, to work to solve this national crisis, particularly as it affects small business. Thank you very much.

Our next panel will include Mr. Englund and Mr. Wampler. Our next witness is Mr. Eric Englund. In addition to his role as executive director of the Wisconsin Society of Architects, he is also the chairman of the Wisconsin Coalition for Civil Justice's Steering Committee.

Mr. Englund, we welcome you to the committee, and we welcome your testimony.

STATEMENT OF ERIC ENGLUND, EXECUTIVE DIRECTOR, WISCONSIN SOCIETY OF ARCHITECTS, MADISON, WI

Mr. ENGLUND. Thank you, Senator Kasten. It is a real pleasure for me to be up here this morning and to share with you and the others in this room on this issue which is, obviously, one that permeates our society and affects all of us.

First of all, on behalf of the Wisconsin Society of Architects, I just would note that it is a perception of most contemporary architects here in Wisconsin that they are very much involved in this liability crisis. In fact, it is certainly their perception that they are in the forefront of it.

As I sit here and listen to others testify, I am—would say that we could not objectively prove that, but I call a few things to your consideration as they affect construction and architecture.

Last year at this time there were in excess of 12 insurance companies who will write—who would write liability coverage for architects. Today, as we sit here today, if you were an architect in Eau Claire, or practicing in this State, you would be lucky to have two carriers who might give you a quote.

Liability premiums for the average Wisconsin architectural firm have tripled in the last 2 years. The costs of that insurance for the average architect in Wisconsin are now nearing 10 cents of every dollar that the firm makes. In other words, for every dollar gross billings, 10 cents goes back out for providing errors and omissions and liability coverage.

Senator KASTEN. I don't—I want to just interrupt you there because that is the way we have got to start to think about this. Cessna Aircraft just went out of small airplanes. They were at a point where on the smaller airplanes that they were making, for example, the Cessna 150, 40 percent of the cost of that airplane was in product liability insurance premiums. They finally said we can not afford it. I did not realize your numbers on architects were up to 10 cents on the dollar right now.

Mr. ENGLUND. Right, Senator. In fact, I think when I think about the value of what you are doing in coming out and speaking to the public on this issue, I think there is a real need to set the agenda on this matter, as you are attempting to do.

When I sit here and heard the prior speakers talk about what their costs were, it does not really ring through until you—the speaker from Cascade, for instance, indicated that more than a dollar for every lift ticket. I am a skier, I know what those lift tickets cost, it starts to make some translation. I think the earlier speaker who talked—spoke about her increase in premiums, we do

not know what to measure it against, and I agree with you, when you start realizing what a significant piece of the pie it is, the seriousness of this issue really rings through.

The other thing that is consistent with your comment is that here in Wisconsin, well over 25 percent of the architectural firms are now doing business without insurance. Unlike Cessna, who decided to completely pull out of the business, the reality here in Wisconsin of small business professionals, is they do not have that option.

They have still got mortgages to pay and kids to put through school. If they cannot afford that premium, they will continue to do business. You talk about deferred costs or deferred maintenance when the roof starts to leak or the building falls in or there is some serious problem, it is only going to be magnified by the fact that these people who are trying to run small businesses were unable to afford insurance.

Even more significant than that, more and more public and private owners in this State, throughout the country, are turning to their architects to provide professional assistance in resolving problems inherent in asbestos in existing buildings. As we sit here today, there is not one insurance company in this entire country who will provide liability coverage for architects who provide the professional service that relates to asbestos abatement.

My list goes on and on, and I think rather than go through that, I will just talk a few minutes about where we feel the change is appropriate. Specifically, on behalf of the architectural profession, we feel that in this area of asbestos there is need for some Federal action. If the insurance industry nationwide is unwilling or unable to provide, at any cost, liability insurance for asbestos-related work, then we are going to need help at either the Federal or State level.

The kind of help that we need is establishment of nationalized standards of care, which people then know that if they meet, they won't be liable, and if they do not meet it, they will be liable. We need to see insurance coverage mandated in some form.

That is not why I am here today, Senator. I am not here just because of what is happening in architecture. Tragically, what we believe is that while there are things, such as asbestos, which are innate to the profession of architecture, that there are some broader societal problems that bring me here to Eau Claire today from Madison. For that response, I would like to take off my hat on behalf of the Wisconsin Society of Architects and talk for a few minutes about the Wisconsin Coalition for Civil Justice. Less than 6 months ago a number of Wisconsin-based professional and trade organizations came together to share some common concerns as they pertain to the current liability crisis and their individual perception that there is a need for change in the civil justice system. I was present during those initial discussions, and I can tell you that they were cautious and that there is a prevailing sense on the part of many of us that there really was not anything we could do.

While we all felt that increased litigation, problems with placing insurance, increased litigation costs, and dramatically increased judgments were a problem that we had to deal with, we were just extremely sensitive, in fact, conservative, to the thought there

would be time for any change. Much to our very pleasant surprise, what we found, Senator, was an extremely broad base of special interest groups who sense that by working together we could impact on the civil justice system and effect some changes. From those early conversations, we put together a group that is called the Wisconsin Coalition for Civil Justice.

Our current steering committee includes the following organizations: The Wisconsin Realtor's Association, the Independent Business Association of Wisconsin, the Wisconsin Institute of Certified Public Accountants, the Federation of Independent Businesses, the Wisconsin Association of Manufacturers & Commerce, the Associated General Contractors of Milwaukee, the Wisconsin Association of School Boards, the State Medical Society of Wisconsin, the Wisconsin Civil Trial Council, our organization, the Wisconsin Society of Architects, the Wisconsin League of Municipality, the Wisconsin Utilities Association.

From that steering committee we have an ever-growing base of operation which now exceeds 50 organizations, and I have appended to my testimony this morning a somewhat outdated list of who those organizations are.

Senator KASTEN. Without objection, the entire list will be made part of the record.

Mr. ENGLUND. Thank you, sir. These groups have banded together in response to their perception of a real crisis in our civil justice system. While we have a deep respect for that underlying system, we feel that there must be legislative change if that system is going to survive and if it is going to work.

Now, what are those changes? We are currently involved in completing an agenda of proposed changes which will be presented to our membership at a meeting in the early—in mid-May of this year. Items which are being studied, and which will most likely be presented, include a commonsense change to the comparative negligence system which will put an end to the current doctrine which allows plaintiffs to recover large damages from the deepest pocket.

Another change is some commonsense limitation to awards for noneconomic damages such as pain and suffering. In consideration of limits for punitive damages. We also are going to propose some changes to Wisconsin laws that deal with frivolous lawsuits, and we are going to be looking very seriously at some legislative changes to the contingent fee system.

Senator, there is—there is nothing on this list that is new. We realize that we are not revolutionary in the ideas that we are promoting. What is astounding and gratifying to us is that with each passing day our coalition broadens. There is a continuing awareness across the full spectrum of Wisconsin of the need for this type of change.

From a personal point of view, I would have considered discussing in public these kinds of changes 6 months ago to be almost heresy. I would have thought we would have been laughed out of the room, not because I did not believe in them, but because I did not believe that there was a broad enough understanding of the seriousness of this problem and the need for change.

What is so gratifying, which justifies my coming up here today, is the fact that there is an understanding of the need for these

changes. We, in the Wisconsin Coalition for Civil Justice, are going to be initially looking at reforms to—that can take place here in Wisconsin. We recognize, we support, and we commend you for your actions as they relate to potential changes at the Federal level.

We strongly believe that there is room for change in the American civil justice system. We believe that it can evolve to be a more fair, more efficient, more predictable, more reasonable, and more effective system.

With your help, Senator, we are going to achieve this goal. We know that. And I thank you for the opportunity to appear today.

[The prepared statement of Mr. Englund follows:]

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STATEMENT OF ERIC ENGLUND, EXECUTIVE DIRECTOR, WISCONSIN SOCIETY OF ARCHITECTS, MADISON, WI

Mr. Chairman and members of the Committee, my name is Eric Englund. I am the Executive Director of the Wisconsin Society of Architects of the American Institute of Architects, an 850 individual member organization in Wisconsin. I also serve as Chairman of the Steering Committee of the Wisconsin Coalition for Civil Justice. On behalf of both organizations I appreciate this opportunity to discuss rising costs and frequently unavailability of liability insurance.

WISCONSIN SOCIETY OF ARCHITECTS

As I'm sure you are aware, prevailing concerns regarding liability seem to affect all aspects of contemporary society . . . including the profession of architecture. In fact, it is a perception of most contemporary architects that they are at the forefront of the liability crisis. Why? Well, consider the following:

1) Last year at this time there were in excess of 12 insurance companies who would write coverage for liability for architects.
2) Today . . . you'd be lucky to get quotes from two such companies.
3) Liability premiums for the average Wisconsin architectural firm have tripled in the last two years.
4) The cost of liability insurance for the average architectural firm in Wisconsin is now nearing 10 cents on every dollar that the firm makes.
5) Well over 25% of the architectural firms in Wisconsin are operating without insurance.

6) More and more public and private owners are turning to their architects to provide professional assistance in resolving problems with asbestos in their buildings. As we sit here today there is not one insurance company who will provide liability coverage for architects who provide a professional service relative to asbestos abatement.

7) The nature of the design and construction process involves many participants. Architects, engineers, land surveyors, landscape architects, contractors, subcontractors, and suppliers all come together to design and build a building. Our current american civil justice system encourages bringing lawsuits against all of these participants when anything goes wrong. While architects "win" on two-thirds of these claims . . . they really lose in the costs involved in paying legal fees and defending these cases.

8) The nature of the professional service of architecture does not allow architects to hide behind the "corporate veil" in their practice. This means that architects must personally place their assets on the line when they provide a professional service.

9) Current insurance industry figures reflect an average of 43 claims per 100 insured architects on an annual basis. What does all this mean? Essentially it is causing a liability paranoia within architecture and causing changes in the way architects do business. These changes include:

   a) More and more of the smaller firms are unable to afford premiums associated with liability insurance and they are, therefore, either closing their doors or going without insurance.

b) Construction specifications are being written by design professionals with a greater eye toward potential liability. This can impose substantial additional costs on the consumer of the architectural service.

c) Architects are refusing to provide professional services in "high risk" liability areas, such as asbestos abatement, even those are arenas in which public health and safety most urgently require their professional abilities.

What has the profession done in response to these changes? Quality control and liability awareness are two key factors in the contemporary practice of architecture. Unfortunately, the perception in the profession is that no matter how hard they work to provide the highest quality professional service . . . the lawsuits keep pouring in.

Mr. Chairman, we need help.

Specifically, we must have protection for asbestos and other hazardous waste. If the industry is unwilling or unable to provide, at any cost, liability insurance for asbestos related work then we're going to need help at either the state or federal level. That help must include:

1) Establishing a nationalized standard of care for asbestos abatement specification.

2) Mandating, at either the state or federal level, certification and training programs and standards for those involved in asbestos abatement.

3) Providing insurance coverage for this risk.

Tragically, these kinds of actions for asbestos will not even start to respond to current liability crisis. For that response I'd like to take off my hat on behalf of the Wisconsin Society of Architects and put on my hat for the Wisconsin Coalition for Civil Justice.

WISCONSIN COALITION FOR CIVIL JUSTICE

Less than six months ago, a number of Wisconsin based professional and trade organizations came together to share common concerns as they pertain to the current liability crisis and their growing perception that there is need for change in the civil justice system. The initial discussions were cautious and there was a prevailing sense that there was nothing we could do to substantively impact on the current conditions which appear to give rise to increased litigation, litigation related costs, and judgements. Much to our surprise, we found an extremely broadbase of special interest groups who sense that by working together we could impact on this civil justice system and effect some change.

From those early conversations has grown the Wisconsin Coalition for Civil Justice. Our current Steering Committee includes the following organizations:

1) Wisconsin Realtors Association.
2) Independent Business Association of Wisconsin.
3) Wisconsin Institute of Certified Public Accountants.
4) Federation of Independent Business.
5) Wisconsin Association of Manufacturers and Commerce.

6) Associated General Contractors of Greater Milwaukee.

7) Wisconsin Association of School Boards.

8) State Medical Society of Wisconsin.

9) Wisconsin Civil Trial Council.

10) Wisconsin Society of Architects.

11) League of Wisconsin Municipalities.

12) Wisconsin Utilities Association.

From that Steering Committee we have an ever growing base of operation which now exceeds 50 organizations. I've attached to my testimony a current listing of those groups.

These groups have all banded together in response to their perception of a civil justice liability crisis. While we have deep respect for the underlying system, we feel that there must be legislative change if that system is going to survive and work.

What are those changes? We're currently involved in completing an agenda of proposed change which will be presented to our membership at a meeting in May. Items which are being studied and which will most likely be presented include:

1) A common sense revival of comparative negligence which will put an end to the current doctrine which allows plaintiffs to cover large damages from the "deep pocket."

2) Some common sense limitation to awards for non-economic damages such as pain and suffering and consideration of limits for punitive damages.

3) Some further modification of the Wisconsin laws dealing with frivolous lawsuits.

4) Consideration of legislative limitations on the contingent fee system.

I'm sure you've seen this list. We don't claim to be hatching "revolutionary" ideas. What is astounding and gratifying is that with each passing day our Coalition broadens. There is a continuing awareness across the full spectrum of Wisconsin of the need for this type of change.

From a personal point of view, I would have considered it heresy six months ago to propose these changes. I would have felt that I would have been laughed out of the room. That is not the case today. These are all defensible and necessary changes. They will come. We find it exciting and gratifying that there is discussion of implementing some of these changes at the federal level.

There's room for change in the American civil justice system. It must evolve to be a more fair, more efficient, more predictable, more reasonable and more effective. With your help we will achieve this goal.

Thank you for the opportunity to present our position today. I'd be pleased to respond to any questions.

WISCONSIN COALITION FOR JUSTICE MEMBERSHIP

Wisconsin Realtors Association
Independent Business Association
Wisconsin Institute of CPAs
Federation of Independent Business
Association of Manufacturers & Commerce
AGC of Greater Milwaukee
Association of School Boards
State Medical Society
Civil Trial Counsel
Wisconsin Society of Architects
League of Wisconsin Municipalities
Wisconsin Utilities Association
Wisconsin Ready Mixed Concrete
Wisconsin Automatic Merchandising Council
Wisconsin Concrete & Products
Wisconsin Restaurant Association
Wisconsin Association of Nursing Homes
Sheet Metal & Air Conditioning Contractors Association
AGC of America Inc.
Wisconsin Counties Association
Wisconsin Recreation Industry
Tavern Hosts of Wisconsin
Wisconsin Farm Equipment Association
Wisconsin Society of Clinical & Consulting Psychologists
Wisconsin Hospital Association
Society of Anesthesiologists
Experimental Aircraft Association
Wisconsin Federation of Co-ops
Wisconsin Credit Union League
Tavern League/Tavern Hosts
Wisconsin Builders Association
CECW
Wisconsin Motor Carriers Association
Wisconsin Auto & Truck Dealers
Wisconsin Aviation Trades
WASDA
Wisconsin Society of Association Executives
Wisconsin Optometric Association
Wisconsin Credit Union League
Wisconsin Dental Association
Oil Jobbers of Wisconsin
Wisconsin Association of Convenience Stores
American Corporation Council
Wisconsin Agri-Business Council
Wisconsin Fertilizer & Chemical
Wisconsin Road Builders Association
Wisconsin Society of Professional Engineers
Wisconsin Railroad Association
Clinical & Consulting Psychologists
Wisconsin Amusement & Operators
Wisconsin School Bus Association
Professional Insurance Agents of Wisconsin
Wisconsin Economic Development
United Foundrymen of Wisconsin
Wisconsin Society of Podiatric Medicine

Senator KASTEN. All right. Thank you for your comments, and I thank you for your testimony, and I might just say that as a politician who has been in the effort of trying to make these changes, it is almost unbelievable the grassroots support and change that has occured since 1981, when I first introduced Senate bill 44. The change is incredible, and this is no longer an issue that is geared toward any narrow group of people.

Our next witness is the reason we are in Eau Claire. But this issue is an issue that now has become a consumer issue. It is not a manufacturers issue, or an architect's issue, or a restauranteur's issue, or a ski hill issue; it is a consumer issue, and I think the very best example of the consumer nature of it is the problem that we are faced with right this moment with measles vaccine.

Our society is going to have to make some difficult decisions. Three years ago we had four different people that were in the business of manufacturing and distributing the measles vaccine. The vaccine is wonderful. It works 99.99 percent of the time. The statistics are one out of 10 million people get an adverse reaction.

Well, over the last 3 or 4 years, because of lawsuits on that 1 out of 10 million, and it happens to be a tragic kind of an accident, normally with a young child, now we have got one person in the measles vaccine business, and their insurance expires this July.

We are not sure—they are not sure whether they are going to stay in the business, and they are not sure whether they can receive or get insurance at any price, if they choose to stay in this business. They have a number of other product lines, and they might just decide it is not worth it. Then our society is in a position of saying 10 million people are going to be exposed to—10 million consumers, 10 million people, are going to be exposed to measles when we know the answer that works for 10 million, and we have not been able to figure out the correct kind of compensation system for that one tragic accident. We do not want to stop compensation for that one tragic accident.

But we also, I think, have a responsibility in our society to encourage a measles vaccine which works for 10 million people and is—has virtually eliminated the danger of measles in our entire society.

The issue is switching, and I appreciate your testimony. I said we were in Eau Claire today for a very special reason, and we are in Eau Claire today because of Mr. Ronald Wampler's role as county administrator and coordinator for Eau Claire County, which is experiencing some terrible problems.

In addition to Mr. Eric Anderson, who I thanked for his hospitality, we want to thank Mr. Ron Wampler for your help, but, particularly, we came to Eau Claire because Eau Claire County is finding itself now in a unique situation, which may not be so unique 6 months from now or 2 years from now, if we find no solution for this product liability problem.

So we thank you for being here today, and we also thank you on behalf of Eau Claire for your hospitality. We look forward to your testimony.

STATEMENT OF RONALD T. WAMPLER, COUNTY ADMINISTRATIVE COORDINATOR, EAU CLAIRE COUNTY, EAU CLAIRE, WI

Mr. WAMPLER. Well, thank you very much. I am also very grateful, and I express my gratitude for an opportunity to appear. I will be coming from a different direction, but I hope I can provide some insight into the problems we are facing, and we are not alone. Many municipalities and counties throughout the United States are facing these problems.

Very briefly, from a premium standpoint, in 1984, Eau Claire County paid a premium of 200—$347,000 for $5 million of coverage. In 1985 for the same type of coverage, our premium increased to $497,000, an increase of 260 percent.

In 1986, at the present time, our county is without liability, umbrella insurance, and very shortly I anticipate being without law enforcement insurance. What insurance does Eau Claire County have? We only have fleet insurance for our county fleet vehicles, and we have property insurance coverage.

As a result of the premium increase, we have terminated all of our involvement and our participation in parades, various community festivities, the patriotic parades that are scheduled for Memorial Day; fireworks for the county always participated in the outlying areas and the various lakes and parks, we no longer will be involved. They can have their fireworks if they can secure somebody else to be the sponsoring agency.

We always were involved in cosponsored or participated in various running events, such as marathons, half-marathons, 4- to 6-mile events. In this type of thing we are no longer involved.

We have been extremely successful in Eau Claire County in establishing a county work-relief program whereby an individual who receives welfare benefits works off the welfare benefits.

We are also looking at expanding this to include the Federal food stamp plan. However, at the present time we are exercising extreme caution on placing any individuals with nonprofit agencies because of the liability problem. This has restricted our placements.

We purchase many services from the private sector. In fact, small—close to $7 million is purchased in our annual budget from the private sector. Why do we purchase it? Well, in many instances, they can do it cheaper and better than county government can, and we acknowledge that.

However, it is almost impossible in the private sector, and when some of the earlier testimony that was received is applicable to the areas that we purchase services from, it is almost impossible for them to provide us the kind of protection that we need if we purchase this service.

By May 15, from a policy standpoint, all our county camping facilities are open. Do we open them? Do we remove all the swings and slides from the parks? How does the county board restrain the general public from bringing alcoholic beverages into our parks? As you know, there are many familiy reunions during the summer. How about the lifeguards at our county beaches? How do we really protect this?

We have a number of dams in the county which we take a great deal of pride in and take care of and annually budget a lot of money for maintenance. How do we prevent the public from fishing and boating in the area? We have had some problems with drownings in the past.

Where do we stand on 1983 Civil Rights cases from occuring in view of the Federal court's action on same? The court's have ruled that a county is liable for volunteer drivers. We have many of our elderly who are at their homes who receive mobile meals and only through the service of volunteers these meals are made possible.

The same is applicable from our human services standpoint on transportation services for the elderly, our volunteers at the nursing home, and volunteers extensively transfer—transport all the veterans in our county, either Minnesota or to Tomah.

I do not know what the solution is to these problems. I do know that we need a cap on the awards. I also know that for a county our size we employ three full-time attorneys, one of whom spends about 40 to 50 percent of his time working on frivolous claims, which is rediculous.

Anything that you could do to help us, anywhere constructively to assist in our dilemma would be appreciated. I would like to point out to you that in any area that the county loses, or is liable, it is the taxpayer who loses. It is just passed on as a property tax payment.

Thank you.

[The prepared statement of Mr. Wampler follows:]

RE: Random Thoughts and Problems Faced by the County of Eau Claire on the Inability to Secure County Liability and Umbrella Coverage

Submitted by: Ronald T. Wampler
County Administrative Coordinator

Eau Claire County has terminated all of its involvement in parades, various community festivities, patriotic parades scheduled for Memorial Day, fireworks on July 4th, at various County outlying lakes/parks, etc.

Eau Claire County has terminated all of its involvement in co-sponsoring or participating in running events, such as marathons, half-marathons, 4 to 6 mile events, etc.

On Eau Claire County's work placements for our County Work Relief Crew (working off their welfare benefits) extreme caution on placement with non-profit agencies is occurring. This has severely restricted our work relief placements and has almost reached the prohibitory stage.

Eau Claire County is exercising extreme caution on all purchase of service contracts. In purchasing services, we take every step possible to protect the County's liability interest.

With the advent of spring, does our County Board from a policy standpoint close down all County camping facilities? Do we remove all the swings and slides from the various parks? How does the Eau Claire County Board of Supervisors restrain the general public from bringing alcoholic beverages into our parks? Example: family reunions - liability standpoint. How about the lifeguards at our County beaches; how do we really protect same?

At our County Dams, what type of barriers do we use? Can you really prevent the public from fishing and boating, etc?

How do we prevent 1983 Civil Rights Cases from occurring in view of the Federal Courts' stands on same? The Courts have ruled that a County is liable for volunteer drivers. Does our Board close down the various aging programs where volunteer transportation is occurring, such as in our Nutrition Program, Human Services transportation services for the elderly, volunteers at our nursing home, and volunteers transporting our veterans?

RTW/mb

Senator KASTEN. Thank you very much for your testimony. It is my memory, and you might correct me, Mr. Wampler, is not there one community in—outside of Chicago that, in fact, has taken its playgrounds down?

Mr. WAMPLER. That is correct.

Senator KASTEN. I can't recall. Do you?

Mr. WAMPLER. It is a suburb—I can't—no, it is a suburb, that is correct.

Senator KASTEN. But just in the last couple of months I can remember seeing the clip come across——

Mr. WAMPLER. Yes.

Senator KASTEN [continuing]. My desk that they had just taken all of their playgrounds down, and I do not know what the situation right this minute is, but as of 1 week ago, Marquette High School in Milwaukee was without any spring athletic program because they were unable to have insurance for the spring sports. They were trying to put something together, but they had been forced to cancel the entire program for spring sports because their insurance liability had been denied, and I think that they are not alone.

I want to go back, Mr. Englund. I was struck by the fact that you said that you have got a quarter of the architectural firms, 25 percent of the architectural firms in Wisconsin are going bare, are going without liability insurance. How has that happened, and what can the Wisconsin Society of Architects do to help its members? Have you looked at self-insurance? Have you tried to do—make efforts to pool together, especially since you say there is an average of 43 claims per 100 injured—43 claims for 100 insured architects annually? If you got a quarter of these people out there bare, it is not going to be long before they get that one suit which puts them under, and could you just build a little bit on facts that——

Mr. ENGLUND. Certainly.

Senator KASTEN [continuing]. You provided for us?

Mr. ENGLUND. Well, Senator, first of all, the practice of architecture in this State is a small business through and through. These are smaller firms. The average architectural firm in this State has less than five people on its staff. Architecture and architects do not have the benefit of the corporate veil. These are people who go out and provide that service and are personally liable and responsible for it.

There are a lot of myths that govern any business. One myth that is prevalent in contemporary architecture is them that's got the insurance are the ones that get sued, and a lot of architects, especially in the smaller firms, feel—and I am not saying that it is correct—but they have a very strong sense that if they do not have insurance and they do not have a lot of assets, they are not going to have problems with lawsuits. Especially—and if you looked at the national statistics and you looked at over two-thirds of the actions brought, the architect wins; in two-thirds of the actions brought, there is no liability. None whatsoever. You—I could not sit across the table and tell an architect to go without insurance. If I were one, I would not go without it. But you can understand why people act that way.

Yes, we have looked into captive insurance. Yes, we have supported legislation at the Federal level to allow pretax dollars to go for set-asides to cover deductible. We have looked at a lot of these things. The reality is that it costs too darn much money to obtain that insurance, and these people are willing to go at risk, whether it is right or wrong. We do not promote it, but they do it, and they have the flexibility to do it.

Senator KASTEN. What you are saying, then, is that by going without insurance, the architect believes he is taking away the deep pocket?

Mr. ENGLUND. Yes, sir.

Senator KASTEN. And that he, on his own right, would not be the target——

Mr. ENGLUND. Exactly.

Senator KASTEN [continuing]. That he is, as an insured individual, because he does not have the deep pocket, there is—less likely they are going to go through with a lawsuit, and they are working, in fact, trying to target toward that deep pocket, take away the deep pocket, which is the insurance company in many of these cases, is the theory, at least, and that therefore, they are less likely to be sued.

Mr. ENGLUND. It gets deflected to someone else. It may be Mr. Wampler, Eau Claire County. It may be someone else who is involved in the construction process or design process. Tragically, because of the deterioration of the system and these tremendous costs, there is a tremendous amount of gamesmanship that is going on. I know it from construction specifications. I can show you where there are efforts to shift responsibility. Again, in the design and construction business, I can show you how owners, public and private, and architects and engineers sort of go at it with each other, trying to say, "You are going to be responsible. No, you are not."

There is such a paranoia out there, and it so permeates business activities as it relates—and it is certainly not just in the construction industry, that is just the piece I know. But you are absolutely right. It is just a matter of trying to feint or hide it under a rock or deflect it to someone else. That is part of the gamesmanship, I think, that is contemporary practice of being in business. I am not saying it is right. But certainly you, and I think the other people in this room, recognize it is there, tragically.

Senator KASTEN. Mr. Wampler, I want to just take that point and follow it one step further. You are now without insurance in a number of these key areas. We find—you find yourself in the position where you still are the target because no matter what you do, you cannot, if you will, take away the deep pocket that is represented by all of the citizens of this community.

Now, a suit comes against the county. What is going to happen when you have a major suit, a major claim successfully made against Eau Claire County? You can't, as Mr. Englund's word, hide under a rock, you are there. Let's just take us through what would happen with a major suit for Eau Claire County today.

Mr. WAMPLER. We would have to levy our—the loss on the following calendar year, on the property taxes throughout the county.

We would have to levy the amount that we lost. That is the only alternative we have.

Senator KASTEN. There is virtually no limit to—at least no legal limit to the amount of dollars——

Mr. WAMPLER. Right.

Senator KASTEN [continuing]. That could be——

Mr. WAMPLER. That is right.

Senator KASTEN. My understanding is that—and my numbers might be a little wrong because they change, literally, every day—there were 33 counties in Wisconsin that were without liability coverage toward the beginning of this calendar year. Most of them have been able to get their insurance coverage in one way or another. I know that you are not speaking for the Association of County Boards or for any larger group than simply Eau Claire County, but could you just give us a sense of what kinds of things are happening in areas outside of the county of Eau Claire?

Mr. WAMPLER. Well, I know that the number of them, and I have been somewhat—I was very upset with a number of colleagues, peer group, because they did go out, and they purchased liability insurance to the tune where they paid $300,000 or $400,000 for an annual premium for 1 million dollars' worth of coverage. I can recall quite vividly bringing this into my governing body, and they laughed at me. They said, "No, Wampler, we are going to set the money aside. We will go self-insurance and do some preventive steps." There are several of them that are still without——

Senator KASTEN. Yeah.

Mr. WAMPLER [continuing]. Coverage, and there are several of them that took the plunge and paid the big premiums so——

Senator KASTEN. Several took the plunge and paid the big premiums. But the point I want to make is that—or I want you to make, and I believe you have made this, that there is no way that you can hide under—under Mr. Englund's rock?

Mr. WAMPLER. No, no.

Senator KASTEN. You are there.

Mr. WAMPLER. In fact, when Mr. Englund was named—at the close of Mr. Englund's testimony, and I have got several architectural contracts going, when I go back to the office, I am going to talk to our staff.

Senator KASTEN. I was thinking about the—you can check the architect for one of those dams.

Mr. WAMPLER. That is true, that is true.

Senator KASTEN. You know, it is an area which has gotten, honestly, so difficult and so complicated I think that I simply want to make the point that our society has a responsibility to work this problem out, not at the expense of the injured consumer. That is not the intent, and I do not think it should be our goal, but we have a responsibility to find the right kind of balance, the right kind of pinpointing of responsibility. Where there is an unsafe product that is made, the person that has made that unsafe product, if they manufactured that unsafe product, should be held liable, and they should pay. But what is happening in our society is we are seeing this—if an architect makes an error, he is negligent, or if a county does something wrong, it is negligent, they should pay. And we want—if anything, through the process of tort reform,

we want to have the system more efficient, so the transaction costs are not so high so people, in fact, will get paid for the problem when it occurs. We now are beyond any bounds of reasonableness. We read recently—not too recently, but there was a weight lifter, a body builder named Columbo out on the west coast. He was not really a weight lifter, he was a body beautiful poser with muscles and baby oil and the whole business. In order to get publicity, he decided he was going to run in a foot race. He—in order to get extra publicity, he decided to strap a refrigerator on to his back. He strapped a refrigerator on to his back, the gun goes off, the race begins, the refrigerator slips and falls and hits Columbo on his foot. Columbo is unable to pose for body beautiful contests for several months. He sues the strap manufacturer for making an unsafe strap and wins $1 million from the strap manufacturer in the State of California.

About 2 weeks ago, we saw just an extraordinary circumstance in which a psychic—a woman that claimed she was a psychic sued the manufacturer of a scanning machine because she lost her psychic powers as a result of being screened. She won. She won in a court of law. Now, someone could say if she was a psychic, why did she not know she was going to lose her powers?

But the point is, we are beyond the bounds of reasonableness. And the cost to our society is extraordinary and getting worse. We simply have a responsibility to work it through.

I am not in a position today to announce any specific legislation which the administration and I have been working on, but I would simply like to say that in the last week I have been working with the administration, the Cabinet Council, the Justice Department, and the Department of Commerce in the process of developing the overall package which the administration is going to bring forward which will address not only the questions that we have raised in Senate bill 44 and Senate bill 100, but also the questions about limitations on noneconomic awards, both punitive damages as well as pain and suffering. And we are proceeding, and I think that there may be some key legislation that comes forward in the very near future.

I want to thank you and the other witnesses that appeared today for presenting this important testimony before the hearing of the Senate Small Business Committee. I would like to point out that there are a couple elements here that we were unable, because of scheduling, in order to include. That interest includes the insurance companies who have testified and will continue to be a part of other hearings, as well as the legal profession, both those that are—and there are two sides within the legal profession, two groups of lawyers, and we have been receiving their testimony at other hearings.

Today's hearing was targeted toward learning of the special problems of small business in this part of the State, and particularly the very special problem in Eau Claire, and we are going to continue to develop this record and to include both input from the insurance side as well as the legal side, along with more cases of—of questions involving small business, trade associations, and local, county, and city governments.

If anyone had any doubts regarding the magnitude and the scope of this problem before this hearing, I think the wide-ranging sectors that are before us today have alleviated any of those doubts. In a State like Wisconsin where 9 out of 10 jobs are provided by small business and where tourism is the second largest employer, it is clear that we are being hurt terribly by the current runaway legal system. We are becoming a litigious society, that is a fact, but unless we correct the problem immediately with tort reform for this particular area, our future is in doubt.

The time has come to put the brakes on this runaway, out-of-control system, and I look forward to working with all of you in our efforts to improve our overall system for the well-being of our entire society.

The hearing is concluded.

[Whereupon, at 10:20 a.m., the hearing was concluded.]

THE COST AND AVAILABILITY OF LIABILITY INSURANCE FOR SMALL BUSINESS

FRIDAY, MAY 30, 1986

U.S. SENATE,
COMMITTEE ON SMALL BUSINESS,
Wausau, WI.

The committee met, pursuant to notice, at 9 a.m., in Branch One Courtroom at the Marathon County Courthouse, 500 Forest Street, Wausau, WI, Hon. Bob Kasten (acting chairman of the committee) presiding.

STATEMENT OF HON. BOB KASTEN, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KASTEN. This hearing of the Senate Small Business Committee is called to order. Today, in one of a series of hearings, the committee is focusing attention on what has been described as the number one consumer issue of our time, the liability insurance crisis. Liability insurance on all fronts is not only becoming more expensive, it is becoming more scarce. Congress has been slow to recognize the depth of the liability crisis.

Everyone, from the small businessman to local government, faces the same problem, finding affordable liability coverage. According to the response from the survey which I conducted last month, as many as 10 percent of Wisconsin businesses may have to shut their doors because of the explosion in liability insurance costs.

Many Wisconsin communities, and Eau Claire, WI, would be just one example—and I understand Clark County is having significant problems as well—but Eau Claire, WI, for example, has had to cancel events such as Memorial Day parades and Fourth of July fireworks. But worst of all, Wisconsinites are losing their jobs because of the liability crisis which is gripping this State and the entire Nation.

Large companies have the ability and the resources to effectively cope with this crisis. However, small businesses across the Nation are closing their doors because they cannot afford liability insurance. This is why, in addition to the Senate Commerce Committee, the Senate Small Business Committee is conducting this series of hearings.

I should point out that this group of hearings is one in which we are having all across not only the State of Wisconsin but also across the country. We have had hearings in the Senate Small Business Committee in Washington, DC, and I have had a number of hearings in Wisconsin, in Eau Claire and in Green Bay. We have

had these hearings by Senator Sasser in the State of Tennessee; we have had hearings by Senator Pressler—chaired by Senator Pressler in the State of South Dakota, and we have had a series of hearings that we are having in Massachusetts by Senator John Kerry.

This is a small business issue because it is affecting small businesses in a way disproportionate and worse than large businesses. Large companies have the ability and the resources to more effectively cope with this crisis, and what we have got to identify are ways that we can help small business. There are many factors involved, but experts agree that the huge damage settlements being awarded by our legal system over the next few years are the driving force behind the huge increases in liability insurance costs.

As you can see from the first chart,[1] which is right here, product liability suits alone have increased from 1,600 in 1974, which is the bottom figure right there, to 13,500 in 1985.

The second chart shows that the number of million-dollar verdicts has increased from 24—we had $24 million verdicts in 1974, to over 400 in 1984. That is a tremendous increase, an increase of 1,600 percent in just 10 years.

I have joined with President Reagan in introducing a comprehensive product liability reform package. This package is built on two underlying truths: First, the consumers have the right to be protected from inferior and dangerous products, and they must have the right to sue.

Second, that responsible producers of goods and services have the right to conduct their businesses without the constant fear that they may be held liable for circumstances beyond their control.

We are in Wausau today as part of this overall series of hearings to get an even better perspective on how various groups are coping with the current problems. And I might point out that in this series of hearings, we are in each hearing seeking to accomplish a different goal.

In the hearings that we have had in Washington and the hearings that we have had in the Commerce Committee, we have been looking at an overall group of people. In those hearings, we've had detailed testimony from the insurance companies; we have had detailed testimony from insurance brokers; we have had testimony from consumer groups; and we have had testimony from big business.

Our purpose in coming to Wausau, as it was in coming to Eau Claire, was to give the one group of people that have not been heard the chance to speak. Big business has their representatives in Washington; the insurance companies have their representatives in Washington; and consumer groups are organized and have their representatives in Washington and have testified before all of our other committees.

The group of people that have not been represented yet in an adequate way, I believe, are the small business people who are coping day by day with the problems that are facing us. So our effort, as we go out—and the Senator from Tennessee, Senator

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[1] Charts referred to on page 841.

Sasser; and the Senator from Massachusetts, Senator Kerry and the Senator from South Dakota, Senator Pressler—all of us have decided to go out to listen to testimony from people that are on the front line, from people that are dealing with this problem, in order for us to get a better perspective.

Before we begin our hearing, I want all of our witnesses to know that their entire written statements will be included in the official hearing record. However, I would ask that each of the testimony be summarized and their remarks be limited to no more than 10 minutes.

Our first witness will be Mr. Darold Brockhaus of Wausau.

Mr. Brockhaus, I would ask for you to come forward and take your place.

Mr. Brockhaus is an accountant here in Wausau as well as the president of the Wisconsin Institute of Certified Public Accountants.

We are pleased to have you this morning, Mr. Brockhaus. I think that you can give testimony from two different points of view. Number one, as a representative of the Wisconsin Institute of Certified Public Accountants to give us a sense of the kinds of issues that you are going to be dealing with as a professional CPA, but, also, I believe that in the questioning, I am hopeful that we will be able to learn from you the kinds of problems that some of your small business associates are dealing with as well. We are pleased to have you here this morning.

We will begin, then, with our first witness, Mr. Darold Brockhaus.

STATEMENT OF DAROLD D. BROCKHAUS, PRESIDENT, WISCONSIN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, WAUSAU, WI

Mr. BROCKHAUS. Thank you, Senator. I think the first thing I would do is request that you get a grant from Washington to fix the air conditioning in this building. It is getting better.

As you said, I am here to represent the Wisconsin Institute of Certified Public Accountants but also as an individual businessman. I believe in my written testimony I have given perhaps more than enough background material on this problem, but I would like to just bring up a few more examples.

First of all, it is almost inconceivable, but the American Institute of Certified Public Accountants now publishes an accountants' liability newsletter, and this happens to be issue No. 12. So it certainly points out the extent of the crisis that a professional organization has to dedicate an entire newsletter to the liability insurance crisis. And in this particular letter, they have a summary of some recent claims against small accounting firms which range from $200,000 to $2 million.

Second, this is the Wisconsin CPA Professional Magazine, the May issue, and it is almost devoted entirely to the professional liability crisis as it affects CPA's.

Finally, the most recent newsletter from the Wisconsin Association of Manufacturers and Commerce is dedicated to the liability crisis. I would like to read just one sentence out of this, if I may.

"The symptoms of this problem are clear: the unavailability, unaffordability, and inadequacy of liability insurance." Then it goes on into detailed discussions.

Finally—and I said finally before, but I came up with one more thing this morning. Yesterday's Wall Street Journal—you may have seen it; it is headed "Generous Juries," and it talks about the awards that have been awarded recently. It has a graph, which is very similar to the graph you have up on the board with the chart going right off the wall, so to speak.

So I think in my written testimony I have demonstrated that CPA's in Wisconsin and all over the country are experiencing the problems of unavailability, unaffordability, and inadequacy of liability insurance.

I also pointed out in my written testimony that the small practitioner seems to be getting hit the hardest. And just to reiterate one point in my written testimony, out of 26 firms—out of 130 that responded to our survey—no longer carry liability insurance. And most of those 26 firms are smaller practicing units.

Senator KASTEN. Twenty-six firms out of 130 no longer carry any insurance at all?

Mr. BROCKHAUS. That is correct, based on the responses to our survey.

Senator Kasten: OK.

Mr. BROCKHAUS. And that worries me. I am sure it worries those people even more, what is going to happen to the legal system when there is no insurance available to fund these awards? Are they going to go after personal assets of people? That could have some very serious consequences, I am sure.

I have also illustrated the problem with cost and unavailability of adequate coverage in our own company, where our coverage has been decreased from $20 million to $5 million while the premium doubled, and next year the premium will triple, and the coverage will drop to $1 million because that is the most that the American Institute Plan can presently write.

I thought you would be interested in an example of small business in the area other than accounting. Last week I talked to Mr. Don Meyer from Dorchester. I am not sure if that is in western Marathon County or Clark Country, but it is right near the border. Don is president of Meyers' Manufacturing Co., a farm equipment manufacturer, and that industry has enough problems without a liability insurance crisis, but their product liability expires tomorrow, May 31. And Don received notice on May 27 that their premiums were being increased from 27,000 to 74,000, which is 175 percent increase, and their coverage is dropping from $5 million to $1 million. It seems like $1 million is the magic number. That is about all that the small business person can afford or can obtain. So on a per-million basis of coverage, that is an increase of 1,270 percent. And I think that is really dramatic.

What do I think the Federal Government should do? I am pleased to see that you have introduced a bill, Senator. I have not seen it, but I happened to read that a bill was introduced in the House, bill number 4874 introduced May 21 by Representative Don Ritter of Pennsylvania. I have a brief summary of that bill which I would like to leave here with you.

Senator KASTEN. Without objection, that bill will be made a part of the record.

Mr. BROCKHAUS. OK. And I note this bill would address most of the recommendations contained in this massive report of the tort policy working group, which I included in my original testimony.

Finally, I would urge you to also support revisions to the RICO legislation. I am sure you are aware of the problems here. This bill was passed to be able to prosecute known racketeers, and now it has been used to sue the heck out of all kinds of people indiscriminately, and I think it provides for triple damages or some very serious economic consequence.

Finally, I think I would just like to mention the economic impact on the Wisconsin Institute of CPAs practitioners wherein a number of firms indicated that they were deferring hiring of staff because they could not afford it. They were postponing equipment purchases because of the high cost of liability insurance, and this is certainly not good for the business community. I think my concluding sentence was, "I am sure I speak for all WICPA members when I say we would like to get this nightmare out of the way and get back to work."

Thank you. If you have any questions, I would be pleased to answer them.

[The prepared statement of Mr. Brockhaus follows:]

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May 23, 1986

Senator Robert Kasten
Room 110
Hart Senate Office Building
Washington, DC 20510

Dear Senator Kasten:

As President of the Wisconsin Institute of Certified Public Accountants, I appreciate the opportunity to testify at the liability insurance hearing in Wausau on Friday, May 30, and to present this written testimony.

I do not believe it is necessary for me to spend a great deal of time trying to demonstrate that there is a professional liability insurance crisis for the public accounting profession. Nevertheless, from a national prospective, I submit the following documentation:

> Exhibit "A" - a letter from the American Institute of Certified Public Accountants dated April 8, 1986, to participants in the AICPA Professional Liability Insurance plan. I am sure the information presented in this exhibit will give you a good grasp of the problem.
>
> Exhibit "B" - the cover, index and first 15 pages of the "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability" dated February 1986. While this report does not specifically address certified public accountants, the comments related to architectural and engineering firms on page nine are certainly appropriate to the accounting profession.

On the Wisconsin level, the problem is certainly similar. In April 1986, the Wisconsin Institute of Certified Public Accountants conducted a survey of member firms. A sample copy of this survey is attached as Exhibit "C."

As of May 20, 1986, a total of 130 responses to the survey had been received by the WICPA office. The respondents are summarized as follows:

Type of Firm	Number of Respondents
National/regional	3
Over 10 partners	7
5 - 10 partners	11
2 - 5 partners	52
Sole practitioners	57
Total respondents	130 practicing units

The responses to question 2 indicated that 26 firms did not carry professional liability insurance. Of these 26, 18 were sole practitioners which indicates that the smaller practicing unit is having the most difficulty with this problem. Of the 26 who no longer had insurance, 9 had dropped it because of unavailability.

Question 4 of the survey asked for information about the cost and coverage of professional liability insurance. The results of this tabulation are certainly startling.

Respondents reported rate increases from 1984 to 1986 as follows:

Size of Firm Responding	Percent of Increase
Over 10 partners	500%
5 - 10 partners	609%
2 - 5 partners	887%
Sole practitioners	738%

An even more dramatic increase results from a comparison between 1981 and 1986 rates:

Size of Firm Responding	Percent of Increase
Over 10 partners	448%
5 - 10 partners	583%
2 - 5 partners	1,057%
Sole practitioners	985%

Question 5 of the survey indicates some of the economic fall-out from the insurance crisis. Twelve respondents indicated they had delayed hiring staff to cope with the increased premiums, while 10 firms indicated they had postponed equipment purchases. Thirty-five firms indicated they had reduced coverage.

In response to question 6, 41 firms indicated they were considering "going bare," while 55 firms said they were considering dropping high risk services (such as tax advice). The written comments received from members in connection with the survey are attached as Exhibit "D."

In my opinion, the unavailability or exhorbitant cost of liability insurance threatens the present system of court awards. This system has in the past, depended on insurance to function. If insurance is not available at reasonable cost, the system will collapse. This could mean that practitioners' personal assets will be at risk and this certainly would be bad for the consumer and the entire business community.

In addition to my part-time job as president of the Wisconsin Institute of Certified Public Accountants, I am the managing partner of a large regional accounting firm.

Our own professional liability insurance premium increased from $46,000 in 1984 to $98,000 in 1985, but the coverage was reduced from $20 million to $5 million because of the unavailability of reinsurance. We are covered by the AICPA plan referred to in Exhibit A.

Currently, the American Institute plan is only able to offer $1 million of coverage and the premium is $1,000 per employee. I have been officially told that the term "employee" refers not only to professional staff but to typists, receptionists, word processors, etc.

In an effort to avoid these substantial premium increases, many professional organizations are considering forming off-shore "captive" mutual insurance companies. I am not an expert in international taxation, but I do believe the Internal Revenue Service will realize no tax dollars from such enterprises.

Enough of the problem. Now on to the solutions.

One of the major solutions is tort law reform. In this regard, I submit as Exhibit "E" pages 60 through 74 from the February 1986 "Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability." Note especially the eight recommendations.

I am not an attorney and do not pretend to understand all of the implications with these eight recommendations. However, two in particular seem to make sense to me and those are (3) eliminate joint and several liability and (7) schedule contingency fees.

In addition to these eight recommendations, I urge you to support amendments to the RICO legislation. I have previously written to you on this subject and I am sure you are very familiar with the problem. The law needs to be changed so that it is applicable to racketeers and not used to sue people indiscriminately.

On the Wisconsin level, the Wisconsin Institute of Certified Public Accountants has joined with a large group of other professional and nonprofit organizations to seek legislative relief. The legislative objectives of this coalition are attached as Exhibit "F."

Finally, Senator Kasten, I urge you to use your personal influence to help pass the necessary corrective legislation to minimize this professional liability insurance crisis. I am sure I speak for all WICPA members when I say we would like to get this nightmare out of the way and get back to work.

Sincerely,

Darold D Brockhaus

Darold D. Brockhaus, President
Wisconsin Institute of
Certified Public Accountants

DDB/cjo
cc: Mr. Joseph Sperstad

* * * * * * *

proposals for change; and the potential impact of non-audit services on auditor independence. In conclusion, Mr. Treadway listed elements which could cause the efforts of the Commission to be viewed as successful. Among these would be whether the Report "provides a basis for other private, public, and professional groups to go further in certain areas -- whether it becomes a springboard for others to pursue matters in more depth."

SPECIAL TORT REFORM BILL HELPFUL TO CPAs INTRODUCED IN CONGRESS

A bill entitled the Professionals' Liability Insurance Reform Act of 1986 would require states to pass tort liability insurance laws conforming to minimum standards set by the bill or face imposition of those minimum standards by Federal regulation. The bill, H.R. 4874, introduced 5/21/86 by Rep. Don Ritter (R-PA), applies to civil actions brought in state courts against a professional on the basis of a negligence, strict liability, or malpractice standard and includes "accountant" in its list of covered professionals. H.R. 4874 provides the following minimum standards: 1) Pretrial screening to discourage frivolous claims; 2) Limitation of joint and several liability so that awards are made on the basis of fault; 3) Restriction of attorneys' contingency fees based on a sliding scale; 4) Periodic payments provided in cases where the award exceeds $100,000; 5) Limitation of non-economic damage awards to $250,000; 6) Judgement awards to be reduced by insurance, wage continuation programs or other payments or benefits intended to compensate the plaintiff for the same injury; 7) Counsel to be held liable for excessive costs when a suit is brought without a reasonable basis in law strictly to achieve an out-of-court monetary settlement; and 8) Punitive damage awards to be paid to the court to cover court costs rather than to the plaintiff. H.R. 4874 was referred jointly to the House Energy and Commerce and House Judiciary Committees.

For further information contact Nick Nichols or Shirley Hodgson at 202/872-8190.

AICPA *Washington Report*

American Institute of Certified Public Accountants
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FIRST CLASS MAIL

WMC Executive/Legislative
INSIGHT
Compiled by Fred Shaffer, VP/Governmental Relations
Vol. 8, No. 21
May 23, 1986

Wisconsin Manufacturers & Commerce, 501 E. Washington Ave., P.O. Box 352, Madison, WI 53701; 608/258-3400

Dear WMC Member:

"The Liability Crisis and Civil Justice Reform" The phrase above was the title of a speech I delivered recently to some members of the Wausau Chamber of Commerce to kick off their "Small Business Week." The title appeared in a program which was mailed to all their members the week before. At least one member thought he would be hearing two separate speeches. "That first subject sounds interesting," he commented, "but the second one sure sounds boring." This illustrates a problem we will face during the coming months — many people are interested in the problem of the "liability crisis," but the solution to that problem sounds dry and uninteresting.

> The "liability crisis" is an issue which has become a popular concern. The U. S. Chamber of Commerce declared that the liability crisis is the No. 1 problem facing American business today. A recent cover article in Time magazine detailed the problems and their impact on American society. Delegates to the upcoming White House Conference on Small Business have voted this issue the No. 1 priority for small business. There is no issue on which we have received more letters and telephone calls than this one.

Symptoms and Causes

The symptoms of this problem are clear: the unavailability, unaffordability and inadequacy of liability insurance. The causes are, however, more complex. Recently insurance companies have earned far less on their investments than they had in the past. This lower investment income and several years of underwriting losses have produced significant losses in the property casualty field. Therefore insurers are becoming more selective in the risks they will underwrite. They are also increasing the premiums they charge.

> Many feel that the insurance industry is also responding to changes in the judicial system. We now award larger judgments than ever to people who sue. In state courts the number of lawsuits increased 22 percent from 1977 to 1981. Federal courts heard 13 percent more civil suits in 1982 alone. In 1962 only one civil award amounted to $1 million; in 1982 there were 251 such awards. However, awards to plaintiffs are only a small part of the cost. More and more of these judgment dollars are being eaten up by attorneys' fees and other costs inherent in the system. Recently the tort system has moved toward a concept of no-fault liability and doctrines which shift the cost of compensation from those who actually cause an injury to those with "deep pockets."

Wisconsin Coalition for Civil Justice

For all these reasons, many now believe the long-term solution to the liability crisis is not more regulation in the insurance industry, but rather a basic reform of our tort system. They also recognize that no single industry or trade association can undertake such an effort alone. Therefore, more than 50 statewide associations have joined with WMC to make civil justice reform a top priority for the Wisconsin State Legislature during 1987. These associations represent interests as diverse as accountants and architects, doctors and defense attorneys, realtors and road builders. A great deal has already been accomplished. A budget has been approved for 1986-87, contributions of $500 each have been received from over 25 of the associations, and a coordinator is being hired. Work is well underway to develop a comprehensive statewide education program aimed not only at state legislators, but at the general public. These efforts will culminate in the introduction (and, hopefully, passage) of legislation next session addressing the following eight issues.

1. Joint and Several Liability — Under the doctrine of joint and several liability, each defendant is liable to a less negligent plaintiff for his or her own individual (or "several") negligence, and also is jointly liable for all of a co-defendant's liability, with a right of contribution between defendants. This, coupled with the doctrine of comparative negligence (which is the system in Wisconsin), means a defendant only one percent liable can wind up paying 100 percent of a judgment! The coalition will work for elimination of joint and several liability in Wisconsin.

2. Punitive Damages -- Punitive damages are a punishment to be inflicted for the sake of its deterrence value -- they do not make the plaintiff "whole." They are subjective, and awards for similar injuries can vary immensely from case to case. The primary targets of punitive damages today are the defendants with "deep pockets," and any dislike or distrust by a jury is apt to bias a decision. Punitive damages have very little deterrent effect because they are awarded years after the offending conduct and usually are covered by insurance. Here in Wisconsin, the coalition will seek to eliminate punitive damages entirely except in the case of intentional torts.

3. Collateral Source Rule -- The collateral source rule prevents disclosure of pertinent sources of compensation which reduce loss to plaintiffs and, as a consequence, prevents awards from being reduced by already paid sources of compensation. It also permits the plaintiff to obtain double recovery of certain components of his damages award. The coalition recommends that the plaintiff not be allowed to recover where collateral sources (e.g., insurance coverage) have already compensated the plaintiff for the loss.

4. Pain and Suffering -- Like punitive damages, compensatory damages (pain and suffering and mental anguish) are inherently subjective and open ended. Damages for similar injuries can vary immensely from case to case. These awards also have a particular impact on insurance rates because they are very difficult to predict. Plaintiffs should be entitled to reasonable compensation for their pain and suffering and mental anguish, but it must be kept within reasonable bounds. For this reason, the coalition recommends capping all non-economic damages at $250,000.

5. Periodic or Structured Payments -- The losing defendant is traditionally required to pay all of the plaintiff's damages in one lump sum payment. In smaller awards this does not present a major problem. However, as average damages have increased into the hundreds of thousands of dollars, this has become a burden on defendants and their insurers. The coalition has endorsed in principle requiring the court to determine the stream of future economic losses, and requiring the defendant to purchase an annuity providing a corresponding stream of compensation.

6. Itemized Awards -- In order for other elements of tort reform to be successful -- i.e., limiting contingent fees to only certain parts of the award or limiting pain and suffering and punitive damages to a fixed percentage of actual damages -- it may be necessary to require juries to itemize all the elements of an award. The coalition recommends that the jury be required to itemize the elements of the award to the extent it is not already required.

7. Contingent Fees -- Plaintiffs' attorneys receive a percentage of their clients' awards, usually between 30 and 40 percent but sometimes as high as 50 percent. Where a plaintiff's award is moderate, such a contingency fee may in fact be quite reasonable. However, as the average plaintiff's verdict has increased in recent years, such a high percentage becomes difficult to justify. Many examples are cited of cases where attorneys receive fees in the hundreds of thousands of dollars for limited work, particularly in mass liability cases. The Wisconsin Coalition for Civil Justice has decided to address this issue, but a specific proposal is still being developed.

8. Frivolous Suits -- Wisconsin has a statute which allows the court to award the successful party costs and reasonable attorney fees upon a finding that a suit was frivolous. Although this law has been on the books for nearly 10 years, it is rarely invoked. The coalition has agreed to look for appropriate modifications to Wisconsin's frivolous suit statute which will make it more likely to be enforced in the future.

Much work has yet to be done on these issues. Your continued attention and active support is crucial to the success of civil justice reform. In the weeks ahead we will provide more information on this subject so that you can convince your elected officials that reform is needed.

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Exhibit "A"

AICPA

American Institute of Certified Public Accountants
1211 Avenue of the Americas, New York, NY 10036-8775 (212) 575-6200 Telex: 70-3396

April 8, 1986

To: Participants in the AICPA Professional Liability Insurance Plan

In response to our year-end announcement of the need to increase premiums in the AICPA Professional Liability Insurance Plan, a number of participants wrote letters raising questions concerning the administration of the Plan and the need for the increase. We attempted to respond to those letters on an individual basis, but the volume was such that we were unable to do so. All the letters were thoughtful. Many expressed frustration, some were challenging and others expressed sympathetic understanding with the profession's predicament.

In order that all participants in the Plan have the benefit of the issues raised by our correspondents, we have prepared a summary in a form of statements and responses which responds to the 20 or so major issues asked about the Plan. To the extent possible, the statements are actual quotes from the letters we received. As you can imagine, a number of the letters received raised issues similar to those raised in others.

We appreciate the time which our participants took in writing to us during the profession's "busy season". The fact that they took that time is an indication of how importantly they view the situation.

Your committee wishes that it could tell you that the problems that have developed during the past two years have been resolved, but they have not. Capacity in our program to accept new business from qualified firms is satisfactory, and every effort is being made to offer again the high limits we came to expect as a norm before November, 1984. Market conditions, however, have precluded us from offering more than $1,000,000 in coverage. In addition, the continuing deterioration of our claims experience mandates that underwriters continue to be selective in underwriting risks. This will mean that identified poor risks will have to pay more for their coverage; and some firms that present a known underwriting risk may not be offered insurance in the Plan at all.

During the past year, we have seen underwriters of state society plans withdraw from this type of coverage at an unprecedented rate since they no longer consider it a viable part of their business. As it has always been, our goal continues to be to offer a liability insurance plan to our profession at a fair premium designed to respond to the losses of our participants on a stable and ongoing basis. We appreciate your participation and will continue our efforts to secure every improvement to the Plan which we can in the circumstances.

Yours very truly,

Walter R. Stock

Walter R. Stock
Chairman, AICPA Professional
Liability Insurance Plan Committee

WRS:nf

AICPA PROFESSIONAL LIABILITY INSURANCE PLAN

Following are "statements" containing comments and/or issues raised by insureds in the Plan and the Committee's response thereto resulting from the announcement by the Plan Committee on December 26, 1985 of the need to increase premiums in the Plan.

STATEMENT:
I read with great dismay the letter from you outlining the reasons for a further increase in the liability insurance premiums. I have been in practice for over thirty years and have not had one claim filed against our firm. I continually read about the millions of dollars paid by members of the Big Eight firms. I am not convinced that I am not paying a portion of those claims.

RESPONSE:
The Plan is designed to offer insurance only for members practicing with firms with up to 250 in staff. There are no "Big Eight" firms insured in the Plan, and the Plan is wholly self-rating. Out of the 15,000 policies now in effect, over 13,000 are written for firms from 1 to 10 in staff. This is truly a program designed for small firms.

It cannot be said, however, that the Plan is isolated from losses either of other accounting firms not in the Plan or of casualty losses in general. In the last two years, the insurance industry worldwide suffered disasterous losses and insurers quite naturally responded by raising premiums for risks they wanted to continue to insure and withdrawing from markets which they felt could not be made profitable. News reports of the results of this movement on municipalities, corporations and the profession appear in the media regularly. The AICPA Plan, whose losses nationwide have exceeded the revenues in the Plan for several years, was affected by that response of the insurance industry. While individual members may have "clean records" and may not be familiar with anyone who has had a claim, the fact remains that the Plan has paid out in defense and settlements substantially more dollars than it has taken in in premiums. Accountants' liability insurance is not seen by the industry as a preferred risk and a number of underwriters of state society plans have shown this by withdrawing from the market.

STATEMENT:
You did not notify us in advance that this premium increase was coming. It was disturbing that the notice of the increase was received in our office on January 12, 1986, which is the anniversary date of our policy. This severely limited our ability to seek coverage elsewhere, assuming we had elected to do so. Further, it appears to have aggregated our right to take advantage of the option of the extended reporting provisions since the payment for those provisions must be in the administrator's hands prior to the expiration date of the policy.

RESPONSE:
Although the committee became aware that there was need for an additional substantial increase in premiums in late November, it was unclear until reinsurance treaties could be signed whether the underwriters would be able to offer any coverage at all at any price. The treaties were not completed until the last week in December. The committee felt that little purpose would have been served by sounding the alarm without offering a solution since there was a question whether there would continue to be a national plan after December 31st, and if there was, what the nature of that plan would be. We are unaware of any new plans that have come into the market in the past year, but are aware of a number of plans that have withdrawn. As far as we know, there was no alternate. As soon as the committee was sure that underwriters and reinsurance commitments would continue, the insureds in the Plan were notified of the problem and of the changes which had to be made both as to limits and pricing. The committee believes it acted expeditiously but cautiously under the circumstances.

STATEMENT:
What concrete justification did the committee have for granting another rate increase other than the underwriter's demands for more premium dollars to be pumped into the Plan?

RESPONSE:
Following the premium increase which was granted by the committee at the end of 1984, the committee and the underwriter agreed in 1985 to have an independent actuarial evaluation made of the Plan. After reviewing several candidates, the consulting firm of Tillinghast, Nelson & Warren, Inc. was engaged to perform an independent study of the claims history and pricing structure of the Plan and to make specific recommendations concerning premium rate structure and the future of the Plan. The Tillinghast report, which was presented to the committee in November 1985, made clear that the Plan required a further substantial premium increase at year end to meet actual and anticipated claims against insureds in the Plan which were increasing in both frequency and severity, and to assure the future financial stability of the Plan.

STATEMENT:
We would be most appreciative if you could provide us with a copy of the new rating schedule which was developed by Tillinghast which is being used to reflect risk as shown by losses to the Plan by firm size. We would like to make an intelligent decision on the rate structure of our own sponsored insurance plan for members.

RESPONSE:
When the Tillinghast firm was engaged to do an actuarial study of the Plan's statistics, it was agreed between the committee, the broker and the underwriter that the report would be confidential and would not be distributed beyond those groups who are immediately involved with the Plan. Although the current crisis is the most severe in memory, competition in the insurance industry has been cyclical over time and "boom and bust" has characterized its operations. It can be expected that there will be an improvement in market conditions, although it is doubtful that premiums will drop to the unrealistic levels that were the norm prior to the present crisis. When that happens, anyone having information in the Tillinghast report could use it to their advantage and to the ultimate disadvantage of the AICPA Plan and those who have been insured with it during these difficult times.

STATEMENT:
We have contacted Rollins Burdick Hunter and have been told that the premium is on a per head basis, whether that head is a janitor, bookkeeper, part-time college student, professional or partner. Our firm currently has a staff of nine fulltime equivalents. We chose to have in-house tax preparation service and in-house bookkeeping by employee clerical staff. From everything I have read and heard from the underwriters, we are being penalized by choosing to do this in-house as opposed to hiring ADP, Compu-Tax, etc.

RESPONSE:
The premium for the Plan is in part determined by a firm's staff size which would include part-time and temporary as well as full-time employees. The committee believes that every employee of a firm has the potential of causing a claim to be filed against the firm, whether it be the CPA performing an audit or a clerical staff person typing a report or failing to make a timely filing. This belief is confirmed by the Plan's experience. The committee, however, is having its actuary perform a review of the premium structure in order to determine whether there is a more equitable and rational way of relating premium costs to risks of a specific practice.

STATEMENT:
We trust that the study will not only consider the number of employees but will also consider the nature of services performed. For example, those firms involved in private placements, securities and exchange commission work, audits, etc., should have relatively greater exposure than a firm involved exclusively in income tax services.

RESPONSE:
Part of the study which will be performed will include a review of the nature of firm services, whether the premium schedule

can be structured according to the nature of services performed by the firm, and whether a sufficiently discreet profile can be identified in an application to support such pricing. At the present time, there is a surcharge for any significant amount of SEC work or other perceived high risk type of service performed by a firm.

STATEMENT:
There are many CPAs like myself who do not feel that they need $1,000,000 in coverage and a $5,000 deductible when their staff size is twelve. However, this is all that Rollins Burdick Hunter offers. Why can they not offer me a $500,000 policy at a reduced premium?

RESPONSE:
Because of the recent significant premium increase, many firms have sought to reduce their coverage below the minimum limits established by the committee. These minimum limits were set several years ago in order to deter firms from having what was considered to be potentially inadequate coverage for their size. However, the study of the premium structure will consider reducing the minimum limits which are available to various size firms. The Plan has experienced 18 claims against firms of 12 or less exceeding $500,000.

STATEMENT:
Is there a possibility that more deductibles could be put into the policy so that the firm could share a greater risk with less premium than is being done at the present? For instance, if a $3,000,000 policy with a $3,000 deductible costs $4,000 and a similar policy with a $20,000 deductible costs $2,000, I would subscribe to the latter because I would be saving $2,000 for $17,000.

RESPONSE:
As with the minimum available limits, there are established deductibles depending upon the limit of coverage selected by the firm. These deductibles were set by the committee and the underwriter as "reasonable" and as being an amount which could be absorbed by a firm. It has been determined that raising the deductible would not cause a significant reduction in the premium. For example, as a rule of thumb in the industry, increasing a $5,000 deductible to $25,000, if acceptable to state insurance commissioners, would result in a reduction of premium of only about 9%. However, the study of the premium structure will consider whether offering optional deductibles at reduced premium rates would be feasible.

STATEMENT:
It appears to me that your committee, as well as many other committees representing all of the professions and industries,

should take a hard look at what is happening in the insurance industry. Claims are not the only expense of operations. How many insurance executives have not received material increases in their salaries over the past several years? How many employees could it do without? Should it operate with belt-tightening efficiency? Many companies are erecting huge buildings as a monument to themselves, are acquiring brokerage houses, banks, other outside businesses, and are probably overreserving for losses.

RESPONSE:
The committee has had many in-depth discussions with the underwriters concerning their internal operating procedures and the expenses involved in defending claims. It was the conclusion of the committee in 1984 that the underwriter was understaffed and requested the underwriter to add additional staff personnel in order to handle the volume of claims and cut down on outside legal expenses. This has been done. The committee believes that the underwriter's operations are efficiently run and that they are not overreserving for losses. Furthermore, as premium rates have increased, the administrators and underwriters have reduced their commission charges to avoid any "windfall benefits" from the Plan.

STATEMENT:
If it is available, I would be very interested in statistical data relative to claims, premiums and expenses especially if they are categorized as between practice units by size.

RESPONSE:
The information you seek is presented quarterly and in substantial detail to the members of the AICPA Professional Liability Insurance Plan Committee, which is made up solely of members in practice in local firms, for their evaluation in administering the program. The specific information is not made public and is proprietary to the committee because the Plan has competed in the past and conceivably will be again competing with other plans when there is an expected improvement in insurance market conditions.

STATEMENT:
The chart attached to your letter of December 26, 1985 labeled AICPA Professional Liability, Average Premium And Costs Per Policy, appears to be somewhat misleading in that they only account for the earned premiums, which is not the overall receipts related to the activity. In my experience with businesses, a business would not be in business if the statistics you presented were valid. The schedule fails to take into consideration the earnings on the idle funds. These earnings should also be taken into consideration otherwise this schedule and the cost passed through to the members in the form of premiums is totally misleading and erroneous.

RESPONSE:
Investment revenue from reserve funds is reported to the committee and credited to the pool from which claims and expenses are paid. Even so, the Plan has had claims exceeding premium and other revenue. You are correct that the statistics presented do not reflect a healthy business. Hence, the recent premium increases.

STATEMENT:
Why is the underwriter having so much difficulty in obtaining coverage over $1,000,000?

RESPONSE:
It is common practice in the insurance industry to divide up the risk of almost every type of coverage among several other insurance companies. This is done through reinsurance treaties which must be negotiated annually. What most consumers do not understand is that, instead of each reinsurer taking a piece of the whole risk, they take selected parts of the risk. To use an example, if one thinks of the risk as a circle the primary insurer and the reinsurers do not slice the circle as you would cut pieces of a pie. Rather, the circle is cut in the shape of a bullseye with the primary insurer in the center assuming the greater risk and the reinsurers taking less likely risks or rings of the bullseye going outward from the center. The reason the underwriter is having difficulty in providing coverage above $1,000,000 is that the reinsurers are not interested in participating even in the less likely risks as represented by the outer circles of the bullseye because of their fear of potential losses. Until the general market conditions begin to show an improvement and the reinsurers' fear of potential losses diminish, the excess coverage will not be available.

STATEMENT:
Perhaps you could achieve a better rate if you had a higher quality of firm that participates in the Plan. By this I mean, if there is a review process that would flush out the firms that have a tendency towards insurance claims, then perhaps the rates could be reduced based on their historical statistics. Let's charge the offenders for the claims if they choose to practice without proper reviews and internal procedures. Perhaps we could use the AICPA review process to be the criteria for this selection of quality firms. Obviously, this would be a reason for joining the AICPA Division for CPA Firms and would assist in the area of participation.

RESPONSE:
As for weeding out poor risks by adroit underwriting or a fail-safe application, approximately 90% of our claims are from firms being sued for the first time. The committee has endeavored since the beginning of the Plan to determine whether firms that

have been peer reviewed offer a lesser risk than firms that have not been peer reviewed. Because of changes in partnerships and difficulties in relating the date of the peer review to the dates on which a claim is based, the committee has found it difficult to validate the feeling of members of the division for CPA firms that they are better risks than firms who are not members of the Division for CPA Firms. The committee will continue its attempt to do so. At this time, however, it appears that members of the Division for CPA Firms from local firms have a slightly higher loss ratio than non members. This is not a reflection of the quality of their work, but rather an indication that their practices are usually more sophisticated than most, with a resultant increase in risk.

STATEMENT:
What is the breaking point for different premium rates relative to the amount of billing?

RESPONSE:
At the present time, premium rates are not based on total billings of a firm. The study which is currently being conducted may, however, incorporate this feature into a more sophisticated premium structure if it is feasible to do so.

STATEMENT:
It occurs to us that perhaps local firms of our size doing no SEC work really have a different exposure for claims. While this is alluded to in your letter of December 26th, we cannot help but wonder if completely separate coverage for various classifications of firms might not improve the chances of a more favorable underwriting base.

RESPONSE:
At the present time, there is one national plan sponsored by the AICPA with one premium schedule based on firm size. There is, however, a premium surcharge for any firm doing a significant amount of SEC or other perceived high risk type of work. It is the policy of the underwriter to add additional surcharges for work indicated on the application which the underwriter feels offers additional exposure for the Plan.

STATEMENT:
I understand the current difficulty that our profession faces but I had hoped that the increase in premium and deductible limits last year had placed the Plan on solid ground.

RESPONSE:
When the committee approved the significant rate increase at the end of 1984, it too had hoped that the changes imposed in the Plan would place the Plan on solid ground for the foreseeable future. Unfortunately, during 1985 claims activity significantly

increased in the Plan while the general market of the insurance industry became more and more chaotic. There is no guarantee that the Plan will be on solid ground in the foreseeable future unless claims activity stabilizes and the insurance industry's market conditions start to show an improvement.

STATEMENT:
Are you able to estimate what are the chances of obtaining our $3,000,000 in coverage when our policy is renewed in August 1986?

RESPONSE:
Until December 31, 1985, the Plan offered up to $5,000,000 in coverage. At the present time, our broker and underwriter have only been able to negotiate reinsurance treaties offering $1,000,000 of coverage to participants in the Plan. They are currently trying to obtain a second $1,000,000 of coverage and hope that in the next few months, they will be able to provide the higher limits to the participants in the Plan that they have been used to offering in the past. There is, however, no way of guaranteeing at the present time whether $3,000,000 in coverage will be available by August 1986.

STATEMENT:
Your letter announcing a rate increase contains a graph showing average premiums and costs per policy. If we are reading the graph correctly, the average costs and premiums for 1986 are projected at $4,000 and $4,500. We did not renew our policy because the quote we received from you was for $23,288. Please advise the reason for the apparent discrepancy between average policy cost and premiums in your newsletter and the quotation provided us on our coverage.

RESPONSE:
The quotation you received was the base rate for a firm with 20 staff members. The graph to which you refer is a graph showing "average" premiums and costs per policy. Of the 15,000 firms participating in the AICPA plan, over 13,000 are firms between size 1 and 10 in staff. The premiums for firms in that category are considerably lower than premiums for a firm with staff size 20. In other words, a firm with a staff of 20 is not an "average" firm in the AICPA plan.

STATEMENT:
We regret to inform you that we cannot renew our policy due to the substantial increase in premiums. We feel that this is very inequitable to firms such as ours that have never had a single claim in our seven years of practice. We simply cannot justify the cost of this coverage and have elected to drop the insurance and go without the protection much the same way doctors did several years ago. We can imagine that there are many others such as ourselves who are also dropping their insurance.

RESPONSE:
The committee regrets that there are participants in the Plan who are dropping their coverage because of the high premiums which have to be charged in order that the Plan be able to continue. Aside from not being able to afford the increased premiums, many firms are deciding to drop their coverage because they believe that they will never be sued and that liability insurance is not necessary. Most of the suits in the Plan are filed against firms who have never been sued before and who never believed that they would be sued. There are also many suits filed against insureds in the Plan which ultimately are dismissed as groundless, but which incur substantial defense costs prior to dismissal. The Plan not only offers protection to firms that commit errors and ommissions but also defense costs for innocent firms which are sued when the basis for the suit is totally groundless. The latter type of claim for which the Plan affords protection is totally beyond the firm's control. In short, the risk of suit appears to be greater than ever, and a decision to "go bare" should not be taken lightly in such an environment.

STATEMENT:
I was in your plan for three years until 1982 and then went with another plan sponsored by my state society because the premiums were considerably less. That plan went out of existence last year and when I filed an application to be readmitted to your plan I was advised that the plan policy would include an exclusion endorsement for any acts leading to a claim which were performed prior to the effective date of the policy. I was also advised to purchase limited extended or "tail" coverage from my prior carrier to protect myself from those acts being excluded from coverage under the AICPA plan policy. My former carrier refused to allow me to purchase extended coverage because my policy had terminated. What am I supposed to do?

RESPONSE:
You are caught in a typical situation which has occurred to many CPA firms who move from one plan to another because they feel they are getting a better deal. Because of the current market conditions every insurer who is still writing professional liability insurance for CPAs includes a prior acts exclusion endorsement on their policy because they do not want to be liable for work done by an insured while insured with another insurance carrier. In addition insurers have considerably cut down on, or eliminated, their "tail" coverage provisions since they no longer want to continue coverage for a firm which has decided to leave them. Moving from one plan to the other to save premium dollars has resulted in many firms incurring serious gaps in their coverage.

STATEMENT:
I urge the AICPA to seek other insurers who will provide insurance at reasonable fees to small CPA firms. I have been able to obtain comparable coverage from another company for considerably less money.

RESPONSE:
The AICPA Plan's broker and administrator has continuously sought alternatives to the present Plan without success. The AICPA Plan is currently the largest liability insurance protection plan for CPAs in the United States. Due to current market conditions, there is little interest by insurers in involvement with accountants' liability insurance. The substantial increases in premiums in the Plan have occurred only in the last two years. Plans which did not raise premiums in that time are no longer in business. If a practitioner can purchase comparable coverage for less without incurring a gap in coverage, he should certainly do so.

STATEMENT:
The real solution to the problem of the unreasonable financial risk imposed on us by the courts will require significant changes in the law. What is the AICPA doing to develop and launch efforts to change the laws that affect accountants' liability? We would like to be kept abreast of what the AICPA is doing, and we would like to know if there is anything we as individual CPAs can do.

RESPONSE:
The Chairman of the AICPA Board of Directors has appointed a Special Committee on Accountants' Legal Liability whose charge includes reviewing possible initiatives for reducing accountants' exposure to amounts and levels of liability consistent with their professional responsibilities and recommending specific actions to the AICPA Board of Directors and the state CPA societies.

The Special Committee has already presented a report to the AICPA Board of Directors as to initiatives being undertaken to bring accountants' liability exposure within reasonable limits. Matters being pursued include adopting "several liability" in proportionate liability statutes to replace "joint and several liability;" making it more difficult for plaintiffs to pursue frivolous suits; retaining the concept of privity (i.e. claims could be brought only by contracting parties rather than unknown third parties); limiting lawyer contingent fees; and pursuing initiatives to enhance the benefits of incorporation for a broader range of firms.

The Special Committee has learned that there are a number of industry, trade and other professional groups that have formed similar committees. The AICPA Board of Directors has authorized the Special Committee to coordinate and join with such other committees and groups to forge the strongest possible efforts for legislation and other changes. Much of this activity will be at the state level, and the Special Committee intends to coordinate very closely with the work of the individual state societies.

Individual CPAs can help these efforts by insisting that their state societies make efforts to coordinate with the AICPA activities in order to change the laws. In the January 1986 AICPA Accountant's Liability Newsletter, members were requested to contact their Congressmen in support of the efforts being made by Representative Rick Boucher (D. Va) to pass a bill that would limit RICO to its originally intended purpose. The Professional Liability Insurance Plan Committee will use the Newsletter to keep our insureds advised about developments, and to suggest further specific actions that can be taken.

Exhibit "B" COC

Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability

February 1986

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INTRODUCTION

AND

EXECUTIVE SUMMARY

In October of last year the Attorney General established the Tort Policy Working Group, an inter-agency working group consisting of representatives of ten agencies and the White House. One of the tasks the Working Group was asked to undertake was to examine the rapidly expanding crisis in liability insurance availability and affordability.

The following is the report of the Tort Policy Working Group on the causes, extent and policy implications of this crisis. The primary contributing agencies included the Department of Justice, the Department of Commerce and the Small Business Administration.

Chapter 1 of the report (The Crisis in Insurance Availability and Affordability) describes in detail the significant problems many businesses, professionals and municipalities are having obtaining liability insurance. The Chapter documents a dramatic change in the last two years in the availability, affordability and adequacy of liability insurance. Where insurance is available (and in some areas it simply is not), premium increases of several hundred percent over the last year or two have become commonplace. Few if any private or public entities that rely on liability insurance have escaped the problems generated by this crisis.

Part A of Chapter 2 (The Causes of the Crisis in Insurance Availability and Affordability) reviews the current financial condition of the insurance industry, and the economic factors leading to that condition. The property-casualty industry in the past two years has suffered significant underwriting losses ($21 billion in 1984; $25 billion in 1985) which have limited its ability to offer as much insurance as its customers desire, and have made it reluctant to insure high risk activities which may expose it to further substantial underwriting losses. These underwriting losses appear to be largely a result of coverage written in the late 1970's and early 1980's which may have been underpriced due to the industry's desire to obtain premium income to invest at the then prevailing high interest rates.

Nonetheless, there is little to suggest that the recent massive increases in premiums is related solely to these losses, or that the cost of liability insurance will decline significantly as the industry limits its underwriting losses and restores its desired level of overall profitability. To the contrary,

indications are that developments in tort law are a major cause for the sharp premium increases. 1/

Part B of Chapter 2 reviews the contribution of tort law to the insurance availability/affordability crisis. The Working Group found that in the past decade there has been a veritable explosion of tort liability in the United States. Four specific problem areas are identified and discussed:

- The movement toward no-fault liability, which increasingly results in companies and individuals being found liable even in the absence of any wrongdoing on their part.

- The undermining of causation through a variety of questionable practices and doctrines which shift liability to "deep pocket" defendants even though they did not cause the underlying injury or had only a limited or tangential involvement.

- The explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as pain and suffering or punitive damages. And,

- The excessive transaction costs of the tort system, in which virtually two-thirds of every dollar paid out through the system is lost to attorneys' fees and litigation expenses.

The Working Group was particularly struck by the extraordinary growth over the last decade of the number of tort lawsuits and the average award per lawsuit. A few examples amply illustrate this point:

- Between 1974 and 1985 there has been a 758% increase in the number of product liability lawsuits filed in federal district court.

- The number of medical malpractice lawsuits per 100 physicians doubled between 1979 and 1983, and tripled during that period for obstetricians/gynecologists.

- According to a jury verdict reporting service, between 1975 and 1985 the average medical malpractice jury

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1/ The Working Group also considered whether state regulation of the insurance industry may be a cause of the crisis, and found little compelling evidence that state regulation is a major cause of these problems.

verdict increased from $220,018 to $1,017,716, and the average product liability jury verdict increased from $393,580 to $1,850,452. 2/

- A survey of punitive damage awards in Cook County, Illinois indicates that the average personal injury punitive damage award (measured in constant 1984 dollars) increased from $40,000 in 1970-74 to $1,152,174 in 1980-84.

The above data demonstrates that the insurance industry was selling coverage at constant or even reduced cost over a period of years during which tort liability was undergoing a dramatic expansion. This suggests that a major factor underlying the availability/affordability crisis is the industry's attempt to bring premiums quickly back into line with rapidly growing liability risks. 3/ The high -- and in some areas unaffordable -- insurance premiums reflect the fact that tort law is now placing a massive compensation burden on the private sector.

A second important contribution of tort liability to the availability/affordability crisis is the tremendous uncertainty that has been generated by rapidly changing standards of liability and causation. The "rules of the game" have become so unpredictable that the insurance industry often cannot assess liability risks with any degree of confidence. This appears to have severely exacerbated the problem.

Chapter 3 of the report (Recent Insurance Industry Developments) summarizes a number of responses of the insurance industry, its customers and state regulators to the crisis. These developments include the use of claims-made policies, the inclusion within policy limits of all or part of defense costs, the increasing use of self-insurance and captives, and more exacting state regulation.

In Chapter 4 of the report (Tort Law Reform) the Working Group concludes that while some of the above recent developments in the insurance industry, along with a likely improvement in the industry's financial condition, should relieve some of the current availability/affordability problems, it is unlikely that these changes will provide long-term, systemic relief without

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2/ For purposes of comparison, the dollar lost approximately half of its purchasing power during this period.

3/ While some have suggested that the dramatic premium increases are an attempt by the industry to recoup its past underwriting losses, for the reasons discussed in the report such a theory makes little economic sense.

some fundamental reforms of tort law. Indeed, there are good reasons to believe that absent such reforms, particularly the insurance affordability problem will remain a long-term fixture of the American economy.

The Working Group recommends eight reforms of tort law that should significantly alleviate the crisis in insurance availability and affordability. The Working Group does not at this time recommend how these reforms should be implemented (whether at the federal or state level, or through legislative or judicial modification of the law); nor are these reforms meant to be an exhaustive list of potential reforms. The recommended reforms are:

- Return to a fault-based standard for liability.
- Base causation findings on credible scientific and medical evidence and opinions.
- Eliminate joint and several liability in cases where defendants have not acted in concert.
- Limit non-economic damages (such as pain and suffering, mental anguish, or punitive damages) to a fair and reasonable maximum dollar amount.
- Provide for periodic (instead of lump-sum) payments of damages for future medical care or lost income.
- Reduce awards in cases where a plaintiff can be compensated by certain collateral sources to prevent a windfall double recovery.
- Limit attorneys' contingency fees to reasonable amounts on a "sliding scale."
- Encourage use of alternative dispute resolution mechanisms to resolve cases out of court.

Chapter 5 of the report (Government Insurance: A Non-Solution) details the reasons why government insurance or indemnification would be highly undesirable and would do nothing to remedy the problems underlying the availability/affordability crisis. Such a federal insurance or indemnification program would not only be extremely expensive, but also could exacerbate the problems of tort law by making the "deep pocket" of the taxpayer available in many cases. In addition, such a program could undermine public health and safety, require more extensive government regulation of private sector activities, involve the government in substantial litigation, lead to increased federal involvement in state insurance regulation, and inhibit the ability of the private sector to adapt insurance services to changing economic and social conditions.

The Conclusion to the report lists five conclusions as to the appropriate response of the federal government to the current crisis in insurance availability and affordability. In sum, the Working Group concludes that while there are a number of factors underlying the insurance availability/affordability crisis, tort law is a major cause which the federal government can address in various sensible and appropriate ways. As for some of the other factors underlying the crisis, such as the insurance industry's recent large underwriting losses, there is little the federal government can or should do to remedy these problems.

In that both the tort liability and insurance developments in this report are highly dynamic, and because more detailed data and other studies undoubtedly will become available, the Working Group will continue to follow developments in this area, and, where appropriate, supplement its conclusions and recommendations.

Richard K. Willard
Chairman
Tort Policy Working Group

Robert L. Willmore
Chairman
Task Force on Liability
Insurance Availability

February, 1986

CHAPTER 1

THE CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY

Liability insurance is a linchpin in the operation of the United States economy, yet many American businesses, professionals and municipalities, both large and small, are encountering serious insurance problems arising from premium increases, policy cancellations and refusals to underwrite certain activities.

The liability insurance crisis has three separate but related faces that individually or in various combinations make it difficult for many entities to obtain the desired liability insurance. These problems are availability of insurance, affordability of insurance coverage and adequacy of coverage.

This Chapter describes the current nature and extent of these problems. The Chapter focuses, first, on the problems encountered within the various lines of insurance, and, second, on the effect of those problems on different sectors of the economy.

I. INSURANCE COVERAGE SUMMARIES

The following are insurance summaries taken predominantly from insurance industry reports prepared by the Alliance of American Insurers or published in Business Insurance.

Environmental Impairment Liability Insurance ("EIL")

EIL covers pollution incidents stemming from gradual pollution exposures (as opposed to "sudden and accidental" pollution, which traditionally has been covered under general liability coverage). Two major companies dropped out of the market in 1985, and by the end of the year only two companies were offering EIL coverage. Forty-seven companies were forced to close hazardous-waste management facilities for lack of EIL coverage. Most hazardous waste businesses currently are looking toward captives and self-insurance. Brokers expect significant price increases on the limited insurance still available.

Sudden and Accidental Pollution Coverage

Coverage for sudden and accidental pollution traditionally has been provided as part of general liability coverage. New general liability forms, however, specifically exclude all pollution liability. This is due to court decisions interpreting "sudden and accidental" coverage as also covering gradual and intentional pollution. (See Chapter 3 for a discussion of the new policy forms.) The London market currently is excluding pollution coverage from the large risks it insures.

Directors and Officers Liability ("D & O")

Premiums in 1985 rose 50% to 500%, and include larger deductibles, lower limits, more restrictive endorsements and shorter policy durations. Industries particularly affected include financial institutions, electric (nuclear) utilities, new high technology business, wildcat oil and gas companies, research and development enterprises, real estate developers, highly leveraged businesses, petrochemical companies and the steel industry. Capacity constrictions have hurt larger risks more than smaller risks. Traditional primary and reinsurance capacity has been reduced, but Lloyd's of London, which has in the past not been active in this line, is offering primary coverage up to $20 million. Not surprisingly, business with Lloyd's of London is up to 100% to 200%. Much of the reinsurance market for such coverage has virtually dried up.

Bank Fidelity Bond Coverage

Premiums are up about 300%. A group of fifty banks are creating a mutual insurer to provide D & O and bankers blanket bond coverage.

Motor Carrier Liability Coverage

Bus and trucking companies are having severe difficulties obtaining the insurance coverage required by federal law. The Motor Carrier Act of 1980 requires insurance minimums of from $750,000 for carriers of non-hazardous cargo to $5 million for carriers of hazardous waste and most hazardous materials carried in bulk. The Bus Regulatory Reform Act of 1982 set insurance minimums from $1.5 million to $5 million, depending on the passenger capacity of the bus. Capacity is limited both in the primary and reinsurance markets. Small trucking firms and independent owner-operators have the most difficulty getting insurance.

Liquor Liability Coverage

Liquor liability coverage may be available as part of a commercial lines package, but is severely constrained and virtually nonexistent in some parts of the country as monoline coverage. This line has been affected by the bankruptcy of one of the largest dram shop insurers, Ideal Mutual Insurance Company.

Medical Malpractice Insurance

Availability problems are being encountered by nurse/midwives, obstetricians/gynecologists, pediatricians and dentists. Premiums are being raised and coverage limits are being reduced, sometimes by as much as 50%. Reinsurers are also restricting coverage in this line. St. Paul's Insurance Company, the largest medical malpractice insurer, has placed a moratorium on new policies. St. Paul's writes coverage for approximately 20%

of the Nation's doctors, and wrote an estimated $600 million in malpractice business in 1985. It had a pure loss ratio (excluding loss adjustment expenses and operating expenses) of 81.3% in 1984. Doctor-owned mutual insurance companies account for more than half of the medical liability coverage in the country.

Commercial General Liability ("CGL")

Commercial general liability insurance has undergone significant premium increases. The Insurance Services Office ("ISO"), the property-casualty insurers' statistical and ratemaking organization, has filed a new CGL form which will limit coverage and which contains certain exclusions and policy limitations (see Chapter 3).

Excess Coverage

Excess coverage capacity has been sharply reduced. This coverage currently is offered primarily on a claims-made basis, which may or may not mesh with the primary, reinsurance and other excess layers.

Reinsurance

Reinsurance capacity for the United States market has been severely limited, particularly with regard to Lloyd's of London, which has faced both its own problems and a disillusionment with the American market. This capacity problem is expected to ease somewhat in 1986, but is likely to remain a problem for some time longer.

II. SECTORAL SUMMARIES

The following are summaries of the effect of the insurance availability/affordability crisis on various sectors of the United States economy. This information was obtained from surveys conducted by business groups, articles in the trade press and materials prepared by trade associations or provided by industry representatives. While the following does not include all of the available information, it summarizes the major findings.

Municipalities

Municipalities are among the hardest hit groups by both affordability and availability problems. Local officials preparing their budgets for the next fiscal year report that the market for public entities is "extremely limited" and "diminishing to nothing." Those cities able to secure bids are finding insurance companies' offers prohibitively expensive. Renewal rates have climbed by as much as 400% -- and often for lower coverages with higher deductibles. Some cities are facing premium increases of up to 1,000%.

The United States Conference of Mayors conducted a survey of 39 cities in the summer of 1985. Over half the cities were quoted premium increases of over 100%, and 16 were quoted increases greater than 200%. In addition, a recent report by the Wyatt Company, Public Officials Liability Insurance: Understanding the Market (1986), notes that local governments have reported premium increases of 200% to 300% in the insurance purchased for their officials.

Rather than renew, many cities have decided to "go bare." All cities have been forced to reevaluate and sometimes limit the services they provide their communities. Finally, in the wake of policy cancellations, a number of city and county officials have resigned, fearing personal exposure to lawsuits stemming from their official duties.

Transportation

The American Public Transit Association, the nation's largest organization of transit operators, reports that premiums for those companies able to obtain insurance this year have gone up 500% to 1,000%, and sometimes more. In Los Angeles, the Southern California Rapid Transit District's annual premium jumped from $67,000 to $1.7 million, while coverage was reduced. Transit problems were compounded by the bankruptcy of one of the largest companies involved in insuring mass transit systems. Some local transit systems have had to suspend operations.

Publishing

Newspaper and magazine publishers are finding it more difficult to obtain libel insurance.

Nurse-Midwives

The American College of Nurse-Midwives represents 2,500 members, 1,400 of whom were covered under a blanket policy through the association. The policy was cancelled on July 1, 1985. The association has been unable to obtain other coverage and has been attempting to create a captive insurer. The captive was to have started operation by April 1, 1986, but that deadline will not be met.

Grocers

A survey by the National Grocers Association found that its members' liability insurance premium rates had recently increased from 25% to 500%. The survey covered 161 retailers and 20 wholesalers.

Architects and Engineers

Most architectural and engineering firms, and particularly smaller firms, are experiencing severe availability and affordability problems. Insurance premium rate increases of

200% to 300% have become the norm. Roughly 30% to 40% of smaller firms are going bare. Engineering firms involved in asbestos or other toxic substances abatement activities face extreme difficulties in obtaining insurance, with rate increases, where insurance is available, of 5,000% not uncommon.

Day Care Centers

The National Association for Education of Young Children conducted a survey of day care providers. They covered family day care providers who care for children in a home setting, day care centers and headstart programs. The survey found that 40% of the respondents had had their insurance cancelled or not renewed and the majority of those with coverage had premium increases, most of which rose 200% to 300%.

Toy Manufacturers

The Toy Manufacturers of America recently surveyed its 243 members on insurance cost and availability problems. Final results will not be available until April, but initial responses are:

Members	%Increase in premiums
21	50
9	50-100
12	100-150
2	150-200
11	300-500
7	500-1000
1	over-1000
2	cannot obtain insurance

Companies that normally had three to four months to negotiate a policy renewal have been given only 72 hours to do so this year. This permits insufficient time for policy shopping. The association reports that it had recommended a captive to its members a few years ago. Commercial insurers reduced prices upon learning of the proposal, eliminating industry interest in a captive.

Household Appliance Manufacturers

The household appliance industry has seen sharp reductions in available coverage, and the Association of Home Appliance Manufacturers has lost group coverage it had arranged in 1983. Many companies have been able to obtain only about one-third of the coverage sought for product liability, and the cost of that coverage is increasing. Member companies are having similar problems obtaining D & O insurance.

Automobile Repair

The Automotive Services Councils, an association representing automobile repair shops and garages, conducted a survey with 104 responses. Average premium increases were 70% to 80%. Some 13% of the membership reported purchasing an average of 30% less coverage. Approximately 41% had experienced policy cancellations and 26% were unable to find new carriers.

Medical Equipment

The medical equipment industry has had a captive, MedMarc, an affiliate of the Health Industry Manufacturers Association, since 1979. The captive started with 35 companies and has recently reached 100 member companies. The rate of growth increased in 1985 as the result of cancellations by commercial insurers of about 20% of the Association's members and premium increases of five to ten-fold.

Biotechnology

Biotechnology companies are having a particularly difficult time in the tight market because they are generally new, small companies dealing mostly in research and development in a field largely unknown to insurers. Their inability to obtain coverage causes them difficulty in obtaining bank financing, which, in turn, causes some of these companies to sell out or forego promising research. The industry is exploring the creation of a captive.

Oil and Gas Drilling

The International Association of Drilling Contractors represents 1,500 contractors operating drilling rigs. It estimates maritime liability premium increases of 300% to 700% and inland liability premium increases of 100% to 150%.

Construction Contractors

Constructor magazine (October 1985) estimates average increases in general liability coverage of 40% to 75%. For contractors who were able to negotiate significant discounts in past years increases currently are running up to 300%. In 1985 premium increases for umbrella coverage were approximately 300% for less coverage.

Natural Gas Transportation

The National L-P Gas Association represents 4,100 firms that prepare and transport liquefied petroleum gases for residential and industrial users. According to a spokesman, as many as 25% of the transporters are operating with less than the $5 million in insurance coverage that is required of motor carriers by federal law. Difficulties are attributed to unavailability and prohibitive costs of umbrella insurance.

General Manufacturing

The Machinery & Allied Products Institute ("MAPI") recently conducted a survey of 81 companies producing a broad range of products in the manufacturing industries and obtained an 80% response rate. The typical respondent experienced increases for every type of insurance covered in the survey. The survey covered general liability, D & O, environmental impairment liability, products and other property and casualty coverages. The size of the increases varied with the date of the renewal; consequently, the survey results understate the problem since many of the respondents are not up for renewal until early this year. Significant survey results are shown in the table below.

MAPI Survey Results on Liability Coverages

Premiums	% Higher	% Change (Median)
CGL-Primary	73	40
CGL-Excess	100	250
D & O	72	300
EIL	94	60
Products	95	116
Other	87	40
Lower Limits	**% Lower**	**% Change (Median)**
CGL-Primary	13	-36
CGL-Excess	66	-50
D & O	27	-25
EIL	59	-50
Products	33	-50
Other	18	-25
Deductibles & Exclusions	**% Higher Deductible**	**% More Exclusions**
GCL-Primary	34	97
GCL-Excess	25	96
D & O	49	95
EIL	50	89
Products	50	100
Other	28	100

In addition to the foregoing, 35% of the MAPI respondents indicated that their general liability coverage excluded "sudden and accidental" pollution coverage, while 49% indicated that it was excluded in some layers and included in others. Some 65% of the respondents indicated that they had some coverages cancelled since January 1, 1985.

Mach. Tool Manufacturers

The National Machine Tool Association represents 300 to 400 businesses that manufacture heavy machinery which cuts, shapes and forms metal. Preliminary results of a survey indicated product liability premiums have doubled since 1984, and that about half of the respondents have been or expect to be put on claims-made policy forms.

Battery Recycling & Smelting Companies

Battery recycling companies are typical of many industries where processes create toxic wastes. Recycling 50 million scrap batteries accounts for up to 50% of the annual lead smelter production. If the batteries are not recycled, they will be disposed of in landfills, leading to more serious toxic exposure. One major smelting company was offered a $10 million policy with a $2.5 million deductible at a cost of $650,000. While it deems the policy uneconomic, it has not found an alternative. The problem is widespread with smelters of various metals. The uncertainty of the risk and size of pollution liabilities has lead to substantial reductions in coverage with sharp increases in deductibles and premiums.

Power Equipment Manufacturers

Outdoor power equipment manufacturers had been reporting premium increases of from 50% to 70% during the past year. At the end of the year, with many renewals coming due, some have experienced increases of 400% to 600%. The Association once again is considering establishment of a captive.

General Aviation Manufacturers

The General Aviation Manufacturers Association reports that the cost of liability insurance per aircaft was $51 for the 6,778 business, commuter and private aircraft delivered in 1962, and increased to $211 for the 9,774 delivered in 1972. Currently, for the 2,000 planes delivered in 1985, the liability insurance cost has increased to $70,000 per plane. The cost of liability insurance to air frame manufacturers in 1985 was about $135 million, with a total cost of $175 to $200 million for the entire industry that includes manufacturers of engines, electronics and parts.

Ski Operators

Liability insurance premium increases of up to 400% have been reported by the National Ski Areas Association. Some small ski areas have closed, and the average price of lift tickets has increased substantially.

Aerospace Equipment Manufacturers

Aerospace equipment manufacturers are increasingly concerned that the escalating cost of product liability insurance and other associated costs are causing them to lose their ability to compete with overseas manufacturers of similar equipment.

III. THE NATURE AND EXTENT OF THE INSURANCE AVAILABILITY/AFFORDABILITY CRISIS

The above examples of insurance availability, affordability and adequacy problems demonstrate the broad scope of the liability insurance crisis in the mid-1980's. In a similar crisis in the mid-1970's, the problem areas were largely confined to medical malpractice and product liability. Medical malpractice coverage has been a continuing problem, with almost half that coverage currently underwritten by doctors' and hospitals' mutuals and other alternative markets. Product liability coverage, however, was readily available at declining cost during the late 1970's and early 1980's.

A growing capacity shortage over the last year or more has caused commercial insurers to review carefully their underwriting standards and pricing policies in order to determine where insurance capacity can be utilized most profitably. The inevitable result of this reevaluation has been a severe disruption for insurance buyers.

Insurance Availability

Availability problems are occurring in certain specialty commercial insurance markets. These include pollution, day care, municipal, liquor, motor carrier and D & O liability coverages. The bankruptcies of some specialty insurers, particularly in the lines of motor carrier and liquor liability, have affected the capacity in these coverages.

In each of these lines, insurers have perceived the possibility of significant losses based on highly publicized verdicts and settlements. General line insurers who ordinarily would fill the gap left by specialty carriers are unwilling to do so because they can use their scarcer dollars in less volatile and more profitable lines.

Insurance Affordability

Premiums are increasing in virtually all commercial coverages. Examples of affordability problems include nurse-midwives and general aviation manufacturers, both of which face premium costs which may be warranted by the experience, but are too expensive for the buyers. Solutions to problems like these appear to lie outside of the insurance system.

Insurance Adequacy

Problems of insurance adequacy are being experienced across all commercial lines of coverage. The main problem seems to lie with the fact that many buyers are unable to buy as much

insurance as they desire. This is particularly true for large firms which seek large amounts of excess and higher limits coverage. These problems appear related in part to a capacity crunch created both by the insurance cycle and the withdrawal of capacity by the overseas reinsurers. The lack of capacity related to the insurance cycle shows signs of abating as the corner of the cycle has turned and surplus is increasing. But many firms may have to use alternative market mechanisms for at least a couple of years until this capacity fully returns. It may take much longer to get reentry by overseas reinsurers who have grave concerns about the American tort liability system. A second area of inadequacy lies in the growth of exclusions, deductibles and other policy limitations that are just now being introduced into the market. These are discussed in Chapter 3.

The Insurance Availability/Affordability Crisis

Finally, it should be noted that the crisis in insurance availability and affordability does not appear to be a crisis for the insurance industry. While the industry (as discussed in Chapter 2) is suffering substantial underwriting losses, the Working Group does not perceive this crisis to be a major threat to the financial viability of the industry. Rather, it is a crisis for the insureds who cannot obtain or afford the insurance they believe necessary for their on-going activities. And, to the extent that entities are forced to operate without insurance or with inadequate insurance, it is a crisis for victims of tortious conduct who may find that liable defendants cannot pay them their damages.

Exhibit "C"

WICPA PUBLIC PRACTICE LIABILITY SURVEY

April, 1986

To: Partners & Practitioners

Your response to this survey will help the Wisconsin Institute of CPAs gather factual information that can be used in the legislature and on other fronts where efforts are underway to resolve the liability crisis.

1. Firm Information:

___National or Regional Firm

Local Firm

___ Over 10 partners

___ 5-10 partners

___ 2-5 partners

Sole Practitioner

___ Full time

___ Part time

SEC Client ___ Yes ___ No

2. Does your firm current carry professional liability insurance? ___ Yes ___ No

If no,

Did you drop it because of high premiums?___ Yes ___ No

Lack of availability or difficulty in obtaining coverage?___ Yes ___ No

3. Who is your administrator?

___ Rollins Burdick Hunter

___ Jamison

___ Frank B. Hall

___ The Laub Group

___ Other _____

4. Provide us with the following information if available:

	Premium	Dollars of Coverage	Deductible	Number of professional staff
1981	$_____	$_____	$_____	_____
1984	$_____	$_____	$_____	_____
1986	$_____	$_____	$_____	_____

5. How have you dealt with the increased premiums? (Check one or more)

___Reduced coverage

___Increased fees

___Delayed hiring staff

___Postponed equipment purchases

___Other _____

6. Are you considering:

Self-insurance? ___Yes ___ No

Going bare (no insurance)?___ Yes ___ No

Dropping high risk services? ___Yes ___ No

Merging your practice? ___ Yes ___ No

Before May 9, 1986, return to: WICPA
CPA Liability
PO Box 1010
Brookfield, WI 53008-9010

COMMENTS FROM MEMBERSHIP SURVEY OF WICPA, AS OF MAY 20th, 1986

1. We need cheaper liability insurance.
2. Assist us in a resolution of the liability insurance crisis.
3. Help CPAs obtain liability insurance that small and mid-sized companies can afford, as well as sole practitioners.
4. Help the CPA profession get a limit on liability awards.
5. Look into setting up our own insurance company that handles only liability insurance, and only for CPAs.
6. Get a liability insurance coverage resolution.
7. Let's deal with insurance coverage and legislative handling of the issues in a positive manner.
8. Provide a forum to resolve escalating professional liability insurance costs.
9. Lower liability rates!!
10. Find professional liability insurance coverage at reasonable cost to the CPA.
11. Help resolve the liability crisis faced by the profession.
12. Help us by showing the public that fees must increase to cover the cost of liability insurance and maintain quality service!!
13. Help reduce the liability insurance premiums.
14. Set up some form of liability insurance for WICPA members-captive insurance company, self-insurance plan.
15. Lobby for WI Legislative actions that help the liability issue and lobby against those that hurt it.
16. Get some positive legislation on professional liability lawsuits.
17. Help us obtain reasonable liability insurance.
18. Help me get some affordable malpractice coverage!!!
19. Start a professional liability program.
20. I would like to see WICPA strongly involved in methods to control liability insurance costs and benefit the members.
21. Help us with the liability crisis.
22. Lobby the Legislature and pressure them into passing meaningful liability insurance laws after consulting with CPAs, lawyers and doctors.
23. Find some type of affordable insurance.
24. Procure professional liability insurance separately (on group basis) for one & two owner CPA firms in small towns. The risk here is less-we should pay less.

COMMENTS (cont.)

25. Help us get a limit on liability exposure

26. Get tort reform!!

27. Lobby for liability premium RELIEF!!!!!

28. Help us get lower "prior acts" insurance rates.

29. We've had to drastically reduce our profit to pay insurance premiums, help us.

30. We've had to absorb the cost, help us reduce costs and still make some profit.

31. I paid the premiums and cried.

32. I had to reduce the staff to pay the premium, but the work load didn't go down and my staff is over-worked.

33. I considered self-insurance until I got sued.

Exhibit "E"

CHAPTER 4

TORT LAW REFORM

As discussed in Chapter 2, two primary areas have been the focus of the Working Group's examination into the crisis in liability insurance availability and affordability: the current economic difficulties of the insurance industry; and, the extraordinary growth in tort liability in recent years. For the reasons discussed in Chapter 2, while it seems likely that the insurance industry will be able to work its way out of its present economic straits, it is very unclear -- if not doubtful -- that this will significantly alleviate the crisis in insurance availability and affordability. Early indications are that insurers will continue to avoid areas that present a high risk of tort liability, or, where they do provide insurance, will demand high premiums. That is, while the more extreme aspects of the availability crisis may be resolved once the industry regains its desired level of profitability, it appears unlikely at this time that the high premiums that have led to serious affordability concerns will be reduced significantly.

For these reasons, as well as for the other reasons discussed in Chapter 2, there appears to be little that can or should be done by the federal or any other government to "remedy" the economic factors that underlie the current availability/affordability crisis. The excesses of the tort system, however, present a very real opportunity to address a major cause of the insurance crisis with sensible and appropriate reforms. And while some of the changes in the insurance market currently under contemplation (see Chapter 3) probably will relieve some availability/affordability problems, it seems unlikely that these changes will provide long-term, systemic relief without fundamental reforms of tort law.

The following is a list of eight tort reforms that would bring a greater degree of rationality and predictability to tort law, and thereby significantly assist in resolving the availability/affordability crisis. This is by no means an exhaustive list of possible tort reforms. Nor does the accompanying discussion of these reforms indicate how they necessarily should be implemented; that is, on the federal or state level, or through legislative or judicial modification of the law. Rather, this list identifies eight recommended tort reforms which if implemented should return tort law to a credible fault-based compensation system that provides a fair and reasonable level of compensation to deserving plaintiffs through a more predictable and affordable liability allocating mechanism. While these reforms undoubtedly will be resisted by some, they in fact are quite modest and should not dramatically alter the basic principles of tort law as those have existed for centuries.

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Recommendation No. 1: Retain fault as the basis for liability.

For the reasons discussed in Chapter 2, fault should be retained as a basis for tort liability. As noted there, fault is the only mechanism in tort law for distinguishing desirable from undesirable conduct, and is an indispensable predicate to many other aspects of the tort liability system without which the system would generate arbitrary and unfair results.

For non-product liability cases, negligence should remain the applicable standard of liability. Strict product liability should under no circumstances be extended outside the traditional area of product injuries. Thus, theories which would apply strict product liability to landlords or to professionals providing services (e.g., pharmacists, architects, etc.) should be strongly resisted and expressly rejected. The trend in some states 1/ to extend strict liability doctrines outside the area of product injuries is a highly pernicious development which will significantly undermine the ability of those sectors of our economy to function properly.

Strict product liability in its traditional sense represents a sensible application of fault-based liability to the realities of modern industrial life. The Working Group, accordingly, does not recommend the abolition of strict product liability, provided the doctrine is kept within its traditional bounds. Unfortunately, strict product liability has been subject to extensive abuse that often has had the effect of transforming the doctrine in practice into absolute liability.

The following are the elements of a strict product liability standard which does not present an impossible or unfair burden to plaintiffs in demonstrating fault on the part of defendant-manufacturers, while at the same time not establishing a scheme of absolute liability which simply uses the manufacturer as an insurer for all risks of injury.

- Liability should be predicated on the existence of a defect which is found to make the product unreasonably dangerous.

- Defendants should only be held liable for uses of a product that are both reasonable and foreseeable. Liability should not be predicated upon unreasonable or unforeseeable alterations of a product that cause the injury, particularly where such alterations are prohibited or warned against. (Alterations, in this regard, can include the failure to provide required and reasonable safeguards, maintenance or inspections.)

1/ See in this regard the recent opinion of the California Supreme Court in Becker v. IRM Corp., 38 Cal.3d 454, 698 P.2d 116 (1985), extending strict product liability to landlords.

- Manufacturers should not be liable for defects which have been the subject of an adequate warning or which are readily apparent to the reasonable consumer. Manufacturers should only be required to warn with regard to uses of a product that are both reasonable and foreseeable.

- Manufacturers should only be held to the state of the art in existence at the time of manufacture of the product. Manufacturers should not be held liable for unknown or unknowable hazards.

The above elements, if applied in a principled manner, should ensure that strict product liability will serve to compensate persons injured as a result of a manufacturer's fault, while preventing that liability doctrine from simply being used as a risk spreading mechanism designed to operate as a product-based insurance scheme.

Recommendation No. 2: Base causation findings on credible scientific and medical evidence and opinions.

One of the most pernicious developments in tort law has been the extent to which causation findings are based on fringe scientific or medical opinions well outside the mainstream of accepted scientific or medical beliefs. Increasingly, juries are asked to make difficult decisions about highly complicated issues of science and medicine. Unfortunately, the personality and demeanor of expert witnesses often may be more critical in making such determinations than decades of evolving scientific and medical investigation and thought.

This problem has resulted in the growing perception that the tort system often is wholly arbitrary in allocating liability in cases involving difficult issues of science and medicine. This is a particularly problematic situation in toxic tort and drug liability cases. 2/

There are a variety of reasons for this problem:

- Many judges do not have the training or inclination to understand complicated scientific and medical concepts, and are unwilling or unable to devote the time and energy needed to educate themselves in a complex body of knowledge.

- In order not to deprive plaintiffs of their opportunity for compensation, many courts allow plaintiffs to take

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2/ For example, see the discussion of Johnson v. American Cyanamid Co., infra.

whatever scientific or medical views they may have -- however incredible -- to the jury.

- Many in the legal system do not appreciate how credible scientific and medical views develop, and the degree to which legal decisionmaking is a poor vehicle for developing such views.

- There often is an understandable frustration with the fact that science and medicine frequently cannot offer the kind of certainty that the legal decisionmaking mechanisms strive to obtain.

The inability of the tort system to deal credibly with complicated scientific and medical issues strikes at the very heart of the ability of tort law to deal with the growing number of cases involving highly complicated scientific and medical issues. While there are no easy answers, there are several remedial actions that the Working Group recommends:

- Greater deference must be paid to government agencies and certain private institutions that have devoted decades of attention and millions of dollars to researching and trying to assess the value of medical and scientific developments. Where such agencies and institutions have determined that particular products, services or techniques are safe or socially beneficial, courts should tread very carefully in overruling those judgments through the vehicle of tort law. Lay juries are a very poor mechanism for second-guessing the judgment of established mainstream scientific and medical views. Other legal mechanisms for determining those views, such as rulemaking and licensing proceedings, generally are far superior in making credible determinations involving complicated issues of science and medicine.

- Courts must be more aggressive in determining the credibility of scientific and medical evidence and opinions before trial, and not simply allow parties to present any theory to the jury. Appellate courts, in turn, should give trial courts greater latitude in making such decisions in early stages of litigation. Judges, where feasible, should receive training on basic methods of scientific, medical and statistical analysis so that they can make such determinations. If necessary, impartial masters with appropriate training should be used for this purpose.

- Studies and opinions that have not been subjected to the peer review process should be presumed invalid. Where peer review has taken place, judges (or masters, where appropriate) should acquaint themselves with the results of such review.

- Courts must learn to accept the reality of uncertainty. They must understand that the fact that some degree of uncertainty always exists does not mean that every scientific or medical belief is as credible as the next. Judges and legislators must not try to "force" scientific certainty where such certainty simply is not possible. Attempts to do so through burden-shifting, presumptions or by requiring agencies to issue scientific "findings," simply create a misleading and deceptive gloss of scientific certainty that in fact does not exist. 3/ Ultimately, the legal system must accept the fact that some things are unknown, and, given existing methods and data, perhaps unknowable for the foreseeable future.

Recommendation No. 3: Eliminate joint and several liability.

One of the most troubling problems in tort law arises from injuries caused by multiple tortfeasors. Historically, such cases were handled by bringing separate actions against each defendant; joint and several liability only existed where concert-of-action was shown (see discussion in Chapter 2). Further, under the doctrine of contributory negligence, a negligent plaintiff could not recover damages from any defendant. Such an approach seemed harsh where plaintiffs were only minimally at fault for their own injuries. Eventually, and in part to remedy the harshness of the old rule, the doctrines of comparative fault and joint and several liability were developed to make it easier for plaintiffs to obtain compensation.

Comparative fault operates to assure that each party, including the plaintiff, is liable for its own fault. Joint and several liability, although originally applied to situations where concert-of-action was shown, is now in many cases applied to all defendants, regardless of their connection to the injury. Comparative fault, when coupled with the doctrine of joint and several liability, allows plaintiffs to recover the entire judgment from "deep pocket" defendants -- even if such defendants are only found to be minimally at fault. Joint and several liability thus frequently operates in a highly inequitable manner -- sometimes making defendants with only a small or even de minimis percentage of fault liable for 100% of plaintiff's damage. Accordingly, joint and several liability in the absence of concerted action has led to the inclusion of many "deep pocket" defendants such as governments, larger corporations, and insured entities whose involvement is only tangential and who probably would not be joined except for the existence of joint and several liability.

3/ As noted, the Working Group does not believe that scientific uncertainty can be handled simply by requiring government agencies to issue pronouncements of risk or causation for which there in fact is no credible basis.

Another problem area is the relationship of joint and several liability to "enterprise" or "market share" liability. See Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980). In theory, "market share" liability such as that established in the California Supreme Court's seminal opinion in Sindell attempts to allocate liability for a generic product (e.g., DES) among various producers on the basis of their share of the relevant market. Even assuming such an allocation is reasonable, 4/ some jurisdictions have devised variations of or alternative approaches to Sindell which apply joint and several liability among the producers of a generic product. 5/ See, e.g., Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, cert. denied, 105 S.Ct. 123 (1984); Collins v. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984). 6/ The difficulties plaintiffs face in attempting to show which manufacturer of a generic product was responsible for plaintiff's injury in fact can be (but are not always) substantial. While the Working Group does not advocate one approach over another, it firmly believes that any allocation of liability on the basis of market share should limit a manufacturer's liability to its specific share, and that such liability should not, in the absence of actual concerted action, be joint and several in nature.

The Working Group thus recommends elimination of joint and several liability, except in the limited circumstances where the plaintiff can demonstrate that the defendants have actually acted in concert to cause plaintiff's injury. 7/

4/ Because of a number of problems and inequities associated with Sindell, only a few states have embraced the position of the California Supreme Court. See Schwartz & Mahshigian, "Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution," 73 Calif. L. Rev. 941 (1985).

5/ It is unclear whether even Sindell is a true "market share" allocation decision, since under Sindell plaintiff must only sue manufacturers representing a substantial share of the market, and may allocate all liability among those defendants in proportion to their respective market shares.

6/ Particularly disturbing are decisions such as Abel which appear to distort the principles of concerted action to impute concerted action to manufacturers of a generic product.

7/ Joint and several liability as discussed in this report should not be confused with the legislatively enacted schemes for allocating financial responsibility for the cost of cleanup of hazardous waste sites and spills under the Nation's environmental laws, and, in particular, under the Superfund Act
(CONTINUED)

Recommendation No. 4: Limit non-economic damages to a fair and reasonable amount.

Non-economic damages such as pain and suffering, mental anguish and punitive damages are inherently open-ended. 8/ They are entirely subjective, and often defy quantification. For example, in many instances it simply is not possible, no matter how much money is awarded, to compensate someone fully for the pain and anguish of the loss of a loved one or from a serious injury. Moreover, because such damages are essentially subjective, awards for similar injuries can vary immensely from case to case, leading to highly inequitable, lottery-like results. Accordingly, such damages are particularly suitable for a specific limitation.

The open-ended nature of such damages makes them a particular problem from the standpoint of achieving predictability. Unlike economic damages (medical expenses, lost earnings, etc.), which can be reviewed objectively and thus can be predicted within a given range, non-economic damages are entirely subjective and unpredictable.

Non-economic damages also can serve as a significant obstacle in the settlement process. Plaintiffs and defendants often can

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7/ (FOOTNOTE CONTINUED)

(the Comprehensive, Environmental Response, Compensation and Liability Act of 1980) and the Resource Conservation and Recovery Act (RCRA). Unlike the tort system, which is intended to compensate injured persons and to deter wrongful conduct (see Chapter 2), Superfund and RCRA represent a legislative choice to allocate the cost of these programs among those who contributed to the problems the programs are designed to remedy. Thus, Superfund and RCRA liability, like the liability established under other environmental laws, are founded upon congressional objectives which provide that those who contributed to the problem or profited from the manufacture which created the waste, ought to bear the cost of cleaning it up. Those whose specific contribution to the site can be identified and severed from the whole are not jointly liable under this scheme. Without some degree of joint and several liability under Superfund and RCRA, the effective enforcement of these programs could be seriously impeded as a result of protracted and costly litigation among responsible parties over the precise allocation of cleanup costs.

8/ There are two types of non-economic damages: compensatory (pain and suffering, mental anguish, etc.) and punitive (sometimes called exemplary damages). The latter are designed purely to punish the defendant.

agree quickly on the amount of economic damages, but disagree sharply on non-economic damages. Plaintiffs frequently have unrealistic expectations of non-economic damages in the hundreds of thousands or millions of dollars to which defendants simply are unwilling to agree. Plaintiffs thus often reject settlement offers that from the standpoint of compensation for economic damages are quite reasonable. Plaintiffs' attorneys also often see high non-economic damage awards as necessary to justify high contingency fees, which may lead them to press for a high non-economic damage award when it may be in their clients' interest to obtain a quick and fair settlement.

Nevertheless, plaintiffs should be entitled to reasonable compensation for their pain and suffering and mental anguish. The key in this regard is to provide such compensation, but to ensure that it will be kept within reasonable bounds.

The Working Group believes that $100,000 would be such a reasonable limitation. In this regard, it should be noted that only a handful of claims involve non-economic damages in excess of $100,000. For example, it is estimated that only 2.7% of all medical malpractice claims (5.6% of all paid medical malpractice claims) receive non-economic compensation in excess of $100,000. 9/ However, in those medical malpractice cases going to verdict where non-economic damages above $100,000 are awarded, the non-economic damages award averages between $428,000 and $738,000 (the latter figure being the "best estimate"). 10/ For such awards including non-economic damages in excess of $100,000, on the average 80% of the total award is for the non-economic damages component of the award. 11/ Since the non-economic damages in excess of $100,000 awarded in these cases (including verdicts and settlements) account for between 28% and 50% of all paid out medical malpractice damages, the non-

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9/ H. Manne, Medical Malpractice Policy Guidebook 132-48 (1985). In comparison, approximately half of all claims that end in a jury verdict in favor of plaintiff include a non-economic damages award in excess of $100,000. Id. This suggests that non-economic damages are a major factor in forcing claims to trial.

As discussed in Chapter 2, the Guidebook was prepared for the Florida Medical Association. Henry Manne served as the general editor, and the analysis on the effect of a $100,000 cap was prepared by Patricia Danzon -- "perhaps the most widely known and published economist in the country on the subject of medical malpractice." Id., at 10.

10/ Id.

11/ Id. In this regard, it is worth noting that non-economic damages as a percentage of overall damages increases substantially as the overall damages increase. Id., at 138-39. See discussion in Chapter 2.

economic damages payments in excess of $100,000 alone account for up to half of all medical malpractice damages. 12/ Thus, a $100,000 limitation on non-economic damage awards would affect only a relatively small percentage of all claims, but would introduce substantial predictability into the tort system. 13/

It also is necessary to deal with punitive damages. While some thought was given to an absolute ban on punitive damages, or perhaps a separate limitation, the Working Group concluded that the best approach would be to include punitive damages within the $100,000 limitation on all non-economic damages. Nevertheless, punitive damages should only be awarded for willful conduct bordering on a criminal violation. Specifically, the Working Group recommends that an award of punitive damages be predicated on a demonstration of actual malice.

Even if these recommendations are adopted, punitive damages at best have a tenuous basis in tort law. Increasingly, there has been growing skepticism among legal scholars about the role of punitive damages, 14/ and numerous instances of extraordinary

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12/ Id. The best estimate of the Guidebook is that pain and suffering awards above $100,000 account for nearly 39% of all medical malpractice damages.

13/ Some states have struck down such limitations on constitutional grounds, primarily on the basis of equal protection, on the theory that it is unfair to limit the recoveries of certain plaintiffs (e.g., medical malpractice claimants) while allowing other plaintiffs to receive unlimited recoveries. Recently, however, both the California Supreme Court and the Court of Appeals for the Ninth Circuit upheld such a limitation for medical malpractice verdicts awarded under California law. See Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665 (1985); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985). The Supreme Court refused to hear either case, finding with regard to the former that no substantial federal question was presented. Constitutional concerns such as this, however, can only be sensibly considered in the context of specific legal proposals.

14/ See, e.g., Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U. Chi. L. Rev. 1 (1982); Seltzer, "Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control," 52 Fordham L. Rev. 37 (1983); Sugarman, "Doing Away With Tort Law," 73 Calif. L. Rev. 555 (1985); Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment," 56 S. Cal. L. Rev. 133 (1982); Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1 (1982).

abuses. 15/ Punitive damages add considerable uncertainty, and frequently have very little real deterrent effect because they are awarded years after the offending conduct. In any event, the punishment of misconduct is primarily a function of the public law enforcement system, and should not be a common purpose of private litigation.

Nevertheless, the Working Group does not recommend prohibiting punitive damages in tort cases provided they are included within the limitation on non-economic damages. If this is infeasible, the Working Group recommends that punitive damages be abolished. 16/

Recommendation No. 5: Provide for periodic payments of future economic damages.

Traditionally, a losing defendant is required to pay all of plaintiff's future damages in one lump-sum payment. When damages were within reasonable limits, this generally was not a major problem. But as average damages have skyrocketed into the hundreds of thousands of dollars this has become an increasing burden on the defendant (or defendants' insurers). The Working Group, therefore, recommends that future economic damages be paid periodically. 17/

Allowing defendants to pay for plaintiff's damages periodically has several advantages. First, it gives defendants the ability in some cases to digest major adverse judgments by spacing

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15/ One of the most flagrant examples is the $8 million dollar punitive damage award against the defendant in Johnson v. American Cyanamid Co., (District Court No. 81 C 2470), for its decision to produce the Sabin rather than the Salk polio vaccine. Despite the fact that the defendant had complied in this decision with the well established medical judgment of the United States government and virtually the entire medical community, the jury apparently decided to use punitive damages to overrule this judgment and to force the Sabin vaccine off the market. Ironically, the Sabin vaccine has proven far more effective than the Salk vaccine in combating polio. The case presently is on appeal to the Kansas Supreme Court, and the federal government has filed an amicus brief urging reversal.

16/ It frequently is noted that the deterrent effect of punitive damages could be achieved through a system of civil fines.

17/ Where there is legitimate concern that a particular defendant may not be able to make the periodic payments in future years the court should be empowered to require the defendant to ensure the periodic payment through the purchase of an annuity.

payments out over time, much in the same way that many consumers can afford major purchases by buying on installment. Second, society is benefited by the fact that plaintiffs have a guaranteed stream of income, and cannot deplete their awards within a few years. This sharply reduces the possibility that severely injured plaintiffs eventually will become wards of the state.

An important additional advantage of requiring courts to award damages in terms of periodic payments rather than lump-sum awards is that it uses the market's rather than a court's assessment of the applicable interest rate. Under the existing practice in most states, the trial court determines plaintiff's economic loss over plaintiff's lifetime, and then awards plaintiff the present value of those losses in a lump sum. The interest rate used to make that present value calculation is critical, and can significantly reduce or inflate the lump-sum payment. Frequently, courts in making that calculation use interest rates that bear no reasonable relationship to what in fact is available in the market.

A periodic payment requirement effectively avoids this problem by having the court determine the stream of future economic losses and require defendant to purchase an annuity providing a corresponding stream of compensation (where defendant is sufficiently large, an actual annuity probably would be unnecessary). Under such a procedure, the market determines the appropriate interest rate for calculating the present value of those payments (the present value would equal the cost of the annuity). Since the payments are guaranteed through the annuity, subsequent changes in the interest rate would have no effect on plaintiff's compensation. Defendant, on the other hand, would have the market rather than a judge or jury determine the correct interest rate for assessing the present value of future damages.

Periodic payments, as noted, are not unfair to plaintiffs because the payments would be scheduled to be made as the damages are in fact incurred (that is, as earnings are actually lost, or as certain expenses actually occur).

Because the benefits of such a provision would be relatively limited for smaller awards, the Working Group recommends that periodic payments only be required where the total economic damages award exceeds $100,000.

Recommendation No. 6: Reduce awards by collateral sources of compensation for the same injury.

The collateral source rule prohibits the finder of fact from taking collateral sources of income related to the same injury into account in making an award of damages to the plaintiff. This effectively permits the plaintiff to obtain double recovery of certain components of his damages award.

In an era when collateral sources of income were financed largely by plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employers, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff.

As to publicly provided collateral sources of compensation, there is no justification for not taking such sources into account in determining plaintiff's ultimate damages. The collateral source rule in such circumstances has the effect of requiring citizens to pay compensation twice -- once as taxpayer, and once as the consumer of the product causing the injury. 18/

The situation is somewhat more complicated in dealing with private sources of collateral compensation, particularly where subrogation is involved. 19/ Where a third party (such as an insurer) is subrogated to plaintiff's claim, the collateral source rule may not in fact result in any double recovery. As a practical matter, however, subrogation often is not a significant consideration in many tort actions. In some areas, such as automobile accidents, subrogation is quite common. In other areas, however, such as medical malpractice, subrogation is far less common.

As to private sources, the best approach appears to be to require collateral sources of compensation related to the same injury to be taken into account as long as a third party is not subrogated to that portion of plaintiff's claim. Further analysis may suggest that elimination of subrogation (that is, simply offsetting all collateral sources against the award, and prohibiting subrogation arrangements) may have a limited effect and be justified on the basis of significant reductions in transaction costs.

While the correct approach to workers' compensation benefits must be considered very carefully, workers should be required to seek their workers' compensation benefits where appropriate. The Working Group takes no position on whether subrogation and indemnification actions between employers and manufacturers

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18/ Another reason to be concerned about such a windfall is that much of the windfall is in fact a windfall for attorneys in the form of attorneys' fees.

19/ In the context of insurance, subrogation allows the insurer to obtain from the tortfeasor-defendant all or part of its payments to the insured-plaintiff arising from the injury caused by the tortfeasor.

found liable as third party defendants should be eliminated, as has been proposed in some legislation. The Working Group will continue to review the merits of proposals dealing with such subrogation and indemnification actions.

Recommendation No. 7: Schedule contingency fees.

Currently, plaintiffs' attorneys receive a flat percentage of their clients' awards, usually between 30% and 40%, but sometimes as high as 50%. Where plaintiff's award is moderate, such a contingency fee may, in fact, be quite reasonable, since the attorney has significant costs and may face substantial risks that must be reimbursed. But as the average plaintiff's verdict has increased in recent years, such a high percentage becomes difficult to justify. Increasingly, there are indications of extraordinary abuses where attorneys receive fees in the hundreds of thousands of dollars for limited work. Particularly in mass liability cases where the groundwork for liability has been laid in previous cases by other attorneys, the fees often bear no relationship whatsoever to the work of or the risk to plaintiff's attorney. 20/

Nevertheless, the Working Group does not recommend, as some have suggested, the abolition of contingency fees. Often, such fees are the only means available to the poor to afford an attorney and obtain access to the legal system. The problem with contingency fees emerges when awards become very high, and a flat contingency rate becomes excessive. The Working Group, therefore, believes that contingency fees should be scheduled to decrease as awards increase.

Specifically, the Working Group recommends the following schedule: 25% for the first $100,000, 20% for the next $100,000, 15% for the next $100,000, and 10% for the remainder. Thus, for an award of $500,000, plaintiff's attorney would receive $80,000 rather than $166,666 (assuming a one-third contingency fee), and for an award of $1,000,000, would receive $130,000 rather than $333,333.

There are a number of justifications for scheduling contingency fees:

- Verdicts often are inflated by judges and juries to compensate plaintiff for what is well understood to be high attorneys' fees. Defendants thus pay for such fees through higher insurance premiums or awards,

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20/ As discussed in Chapter 2, the prevailing plaintiff is not only liable to his attorney for the agreed to contingency fee, but also for litigation expenses. Such expenses often can amount to an additional five to eight percent of the underlying award.

which, in turn, are passed on to consumers through higher prices. It is difficult to justify placing such a burden on American consumers for the purpose of paying what often amounts to exorbitant attorneys' fees.

- Similarly, in order to compensate plaintiffs for very high contingency fees, settlements often are higher than otherwise would be the case. As with high awards, these payments ultimately are passed through to the consumer. More problematic, however, is that attorneys' fees often can become a major impediment to settlements since defendants may balk at paying a higher than justified award in order to compensate plaintiffs for exorbitant attorneys' fees. In such situations, attorneys' fees create an additional burden by causing cases not to be settled that otherwise would be settled.

- Contingency fees also distort the incentives of attorneys. Such fees may lead plaintiffs' attorneys to hold out for high non-economic damages (and, potentially, windfall profits for the attorney requiring only minimal additional work on the attorney's part), while the clients may be best served with obtaining economic damages and more limited non-economic damages as promptly as possible.

- Scheduling contingency fees also should substantially reduce the excessive transaction costs presently plaguing the tort system. This is particularly important in such areas as the asbestos litigations where there are only limited resources available to compensate a large pool of plaintiffs.

In this regard, it is worth noting that the Federal Tort Claims Act contains a 25% cap on attorneys' fees for lawsuits filed under the Act, and a 20% cap on attorneys' fees for settlements obtained under the Act's administrative claims process. 28 U.S.C. § 2678. Violations of these limitations are punishable by fine or imprisonment, or both. A similar 25% attorneys' fee cap (with similar sanctions) is found in the Social Security Act. 42 U.S.C. § 406. None of these caps appears to have had any significant effect on the ability of persons suing the government to obtain adequate legal representation. In fact, the number of lawsuits filed under both the Federal Tort Claims Act and the Social Security Act has increased substantially in recent years.

The Working Group has considered and recommends against the adoption of the English Rule on attorneys' fees, which would transfer attorneys' fees to the losing party. While such a rule might deter some frivolous litigation, it also would inhibit many lawsuits that may be merited but where some preliminary discovery may be necessary to determine the strength of plaintiff's claims. Moreover, because many plaintiffs essentially are judgment proof, the widely held belief that such

a rule would significantly deter frivolous litigation may be largely illusory.

A preferable (but still problematic) alternative approach to the English Rule would be to use a transfer of attorneys' fees as a means of motivating parties to settle their claims at an earlier point in litigation. Thus, a rule modeled on Rule 68 of the Federal Rules of Civil Procedure, 21/ but including attorneys' fees, might be useful. Perhaps the most promising approach would be to combine alternative dispute resolution with a transfer of attorneys' fees.

Recommendation No. 8: Develop alternative dispute resolution mechanisms.

The Working Group believes that alternative dispute resolution holds much promise. Experimentation and experience, however, is the only reliable vehicle for determining which systems will work. Alternative dispute resolution proposals range from binding arbitration to mediation, and include such procedural innovations as mini-trials and expedited discovery techniques. Many of these proposals are worthy of serious consideration, and states represent excellent laboratories in which to develop and explore these various alternative dispute resolution proposals.

The Working Group strongly supports alternative dispute resolution, and believes that the organized bars, legislatures, and jurists should be more receptive to alternative dispute resolution proposals. Where necessary, particularly in areas such as medical malpractice, states should be encouraged to consider seriously the necessary constitutional changes to permit the use of alternative dispute resolution.

The Working Group believes that the most promising use of alternative dispute resolution will be to encourage the early settlement of lawsuits. For example, requiring non-binding arbitration where part or all of attorneys' fees shift to the party which rejects an arbitration award and obtains a less favorable result in litigation, much as costs of litigation are shifted for rejected offers of settlement under Federal Rule of Civil Procedure 68 (see supra), might be an effective means

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21/ Rule 68 ("Offer of Judgment") provides that costs of litigation will shift to a plaintiff who has rejected an Offer of Settlement made under the rule and not obtained a judgment more favorable than the rejected offer. There currently is a proposal under consideration to include attorneys' fees in Rule 68, as well as to make other changes to the Rule. Inclusion of attorneys' fees in Rule 68, however, has a number of serious problems that must be considered very carefully. These and other problems have led the Department of Justice to caution against the proposed changes to Rule 68.

for using alternative dispute resolution to facilitate and expedite early settlements.

The Working Group does not believe, however, that alternative dispute resolution needs to or should involve major changes to the standards of liability or causation in tort law. The merits of alternative dispute resolution are largely unrelated to which standard of liability is used in resolving disputes. The value of alternative dispute resolution lies in procedural rather than substantive changes in the law.

Exhibit "F"

WISCONSIN INSTITUTE OF
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LEGISLATIVE OBJECTIVES DIRECTED TOWARD ACHIEVING
CIVIL JUSTICE THROUGH TORT REFORM

* Replace joint and several liability with several liability with no joint features.

* Limit class action suits.

* Place contingent fees on a percentage basis that moves inversely to awards.

* Discourage "I have nothing to lose" and frivolous suits by instituting damages for suits found to be without basis and a reduction in awards in those instances where a court ordered award does not exceed a previously offered settlement.

* Limit the discovery process.

* Limit non-economic awards.

* Require itemization of awards over a fixed minimum.

* Do away with "double dipping" and require the disclosure of collateral awards.

* Provide for installment payment of awards over a fixed minimum for non-economic awards.

Senator KASTEN. Mr. Brockhaus, I think, without question, that it is a nightmare, and it is a problem that all of us are dealing with, and I appreciate very much your testimony.

I think what we will do is we will go to Mr. Opsahl first, and then I will ask questions of both of you. So if you could just remain. Our next witness is Mr. Robert Opsahl of Merrill. Mr. Opsahl is the director of administrative services for the Merrill Public Schools. Mr. Opsahl, the committee welcomes your testimony, and we thank you very much for being here. As I said earlier, your entire statement will appear in the record as if read. And we would ask that you summarize your statement to less than 10 minutes.

Thank you very much and welcome.

STATEMENT OF ROBERT OPSAHL, DIRECTOR OF ADMINISTRATIVE SERVICES, MERRILL PUBLIC SCHOOLS, MERRILL, WI

Mr. OPSAHL. Good morning. Well, I got a call from Steve asking that we testify as to some of the problems that Merrill Public Schools is faced with because of rising insurance costs and the effect it has had on our tax levy and, well, any other chain reactions or things that we see that are happening as a result of increased claims. I can best explain the impact to the Merrill Schools, and I am sure other schools in the area are the same way.

A 1-percent levy increase for the Merrill School District translates to approximately $39,000 in our 1986–87 budget projection, so our costs for general liability, property, workmen's compensation, and student insurance or our student benefit plan amounted to $122,700 in 1985–86. Our insurance carriers have advised us to budget $180,000 for the same coverage during the 1985–86 school year. This increase totals to about $57,900 or approximately a 47-percent increase in insurance premiums for the same coverage.

Most of the increase is contained in our G.L., or general liability, insurance, and our student benefit plan. And that approximates about 1.5 percent of a levy increase in just our insurance budget. So, simply stated, the increase means that about $58,000 in increased insurance premiums will be allocated rather than used to serve the educational needs of students in the Merrill community.

Our insurance carriers explained the increased premiums for liability coverage in these ways. First of all, we have definitely an increased number of claims. Claims that occurred 2 or 3 years ago are being settled now at much higher awards than originally projected by the insurance companies. So they are saying that if they go back and check their records 2 or 3 years ago, they do not really have large premium increases.

However, the claims that are being settled that are coming up, that are coming out of the closet, are costing them much more to settle. So, consequently, they are raising premiums in order to offset increased settlements that they know are going to incur—that occurred 3 or 4 years ago. So the cost of these higher awards, then, are passed on to us, the customer.

Another reason, juries are more prone to award settlements in favor of the claimant. Jury awards have been described by our carrier as many times bizarre. Another reason is there is simply an

increased awareness that people can access themselves via the courts to the deep pocket, such as a public school district.

In the past we did not have a lot of lawsuits in the school industry. I have been in my present role for 15 years, and I think the large settlements have increased in the last 5 or 6 years. People did not sue schools and they did not sue their church and they did not sue doctors in the past. And that is changed now, and I guess the media has certainly provided many illustrations, almost on a daily basis, of where people can secure huge cash settlements from the deep pocket entity, such as the public school.

Another reason the insurance carriers tell us is that payment for pain and suffering awards are very high. In addition, the board's legal defense costs are also running much higher. Our insurance carrier, which is Wausau Insurance, gave an illustration of just late where there was a pain and suffering award of $10,000. This was settled in court; the pain and suffering, $10,000. However, the defense costs, which included various expert witnesses that they to called in ran $20,000.

Our insurance company, Wausau Insurance, is initiating what they call a claims-made basis now in handling insurance claims as opposed to the occurrence basis that we have used over the past several years. The claims-made procedure, will allow the insurance company to set aside higher reserves with a projected inflationary factor to cover incidents that they feel may develop into a serious liability settlement later on.

I have an illustration in our statement. Merrill Public Schools is now being sued for $50,000 by an ex-student who, in the fifth grade, experienced a playground accident where she injured an elbow. The injury was handled by Blue-Cross Blue-Shield and also by our WIAA benefit plan coverage as a normal playground accident. The student graduated from our high school and is now suing us for a permaneot partial disability. Our liability carrier initially disallowed the claim because they said it had not been reported to them within 60 days. And so this was another hassle for us in order to go back to the insurance company and go to people that could advise us as to the fact that they had to provide coverage because we were on an occurrence basis at the time of the injury. Well, this is part of the reason why our present insurance company now is resorting to a claims-made practice.

So Merrill Schools are now reporting any incident of a playground or athletic injury that necessitates doctor care to our liability carrier, and this involves one huge amount of paperwork. The insurance company now is setting aside greater reserves to cover these possible injury claims. In summary, we've been advised that a fundamental solution to alleviate rising insurance costs would necessitate some limits on pain and suffering awards.

Also, there needs to be a limitation on defense costs. Insurance companies have informed us that it is simply not economical or feasible to try a case that involves extensive utilization of expert testimony such as psychological, medical, legal witnesses, in order to prove their case. Thus we have out-of-court settlements, and it has become too easy to secure an out-of-cout settlement. The out-of court settlement will be less than the original lawsuit; however, it still results in many thousands of dollars.

If you would like, I can go on and give you a specific example of what has happened to us as far as lawsuits are concerned and some of these out-of-court settlements. On the other side of the fence, when we questioned, say, a defense attorney on this, a well-known defense attorney in Wausau won a case against us and our insurance company in out-of-court settlement just recently.

We felt that it was simply out of order completely to settle. The lawyer talked to me and he said, "Well, you really feel sorry for those insurance companies, don't you?" He said, "The next time you drive by these huge buildings and these mausoleums and monuments," he said, "you just tell me"—"think about how sorry you're feeling for the insurance companies."

So we have that sort of thinking going on in our society also. And, in the end, Merrill Public Schools—and all school districts—are simply victims who pay in taxes and tax money that is not—it is not meant for that. It is meant to educate children.

Thank you.

[The prepared statement of Mr. Opsahl follows:]

MAY 28, 1986

SENATOR ROBERT KASTEN HEARING RELATIVE TO RISING INSURANCE COSTS

TO: Senator Robert Kasten and Committee Members:

I am Robert Opsahl, Director of Administrative Services, Merrill Area Public Schools, Merrill, Wisconsin. I have been asked to present a statement to this committee relative to the rising costs of liability insurance coverage for our school district.

The cost impact can be explained as follows: A 1% levy increase for the Merrill School District translates to $39,000 in 1986-87. Our cost for general liability, property, workmen's compensation, and student insurance amounted to $122,721 for the 1985-86 school year. Our insurance carriers have advised us to budget $180,691 for the same coverage during the 1986-87 school year. This increase totals to $57,970, or approximately a 47% increase in insurance premiums. Most of the increase is contained in our general liability and student benefit plan coverage; which approximates a 1.5 levy increase in just our insurance budget. Simply stated, the increase means that approximately $58,000 in increased insurance premiums will be allocated rather than be used to serve the educational needs of students in the Merrill Community.

Our insurance carriers explain the increased premiums for liability coverage as follows:

1) Increased Claims: Claims that occurred 2 or 3 years ago are being settled at much higher awards than originally projected by the insurance companies. The cost of the higher awards are passed on to the customer.

2) Juries are prone to award settlements in favor of the claimant. Jury awards have been described by our carrier as "bizarre" in many instances.

3) There is an increased awareness that people can access themselves via the courts to the "deep pocket" such as a public school district.

In the past, people did not sue schools, churches, doctors, etc. The media has provided many illustrations of the possibility of securing huge cash settlements from the "deep pocket" entity.

4) Payment for pain and suffering awards are very high. In addition, the Board's legal defense costs have also risen tremendously. Our insurance carrier gave an illustration for a pain and suffering award of $10,000. The cost for defense which included various expert witnesses was $20,000.

Our insurance company is initiating a claims made process to replace the occurrence reporting practice of the past. The claims made procedure will allow the insurance company to set aside higher reserves with a projected inflationary factor to cover incidents that they feel may develop into a serious liability settlement. As an illustration:

Merrill Public Schools is now being sued for $50,000 by an ex-student who in the 5th grade experienced an injury to the elbow in a playground accident. The injury was handled by Blue Cross/Blue Shield and our WIAA benefit plan coverage. The student has graduated from our high school and is now suing us for permanent disability. Our liability carrier initially disallowed the claim due to the fact that the injury was not reported to them within 60 days. This is part of the reason why our present insurance carrier is resorting to a claims made practice. Merrill Schools are now reporting any incident of playground or athletic injury that necessitates a doctor care to our liability carrier. The insurance company now sets aside greater reserves which increases our premiums.

SUMMARY: We have been advised that a fundamental solution to alleviate rising liability insurance costs would necessitate some limits on pain and suffering awards. Also, there needs to be a limitation on defense costs. Insurance companies have informed us that it may not be economically feasible to try a case that involves extensive utilization of expert testimony, such as psychological, medical, and legal witnesses in order to prove their case: Thus, there are out of court settlements. It may have become too easy to secure an out of court settlement, though less than the original lawsuit; it may still result in several thousand dollars.

Thank you.

Robert Opsahl

Senator KASTEN. Mr. Opsahl, thank you very much for your testimony. The Wausau Daily Herald ran a headline recently. It said "Merrill School Levy May Increase 11.5 Percent. Fifty-two percent increase in insurance costs will help push the proposed Merrill Area Public Schools' tax levy 11.5 percent higher than last year's levy."

In past hearings, around the country and in Wisconsin, we have talked at length about how increased insurance costs can be passed on to the customer. This seems like a perfect example except that it is the Government passing on the costs. Do you have any alternatives to passing on these costs in this way? Cutting back on education would not be an——

Mr. OPSAHL. There are some costs that we simply—well, we have a difficult time controlling. You know we have a difficult time controlling our costs for utilities, things like this, transportation, insurance. We can control the cost of educating children by reducing staff. But it is very difficult for us to cut back on our errors and omissions coverage, for instance, our general liability when we have so much exposure.

It has gotten to a point now where any boy involved in athletics potentially—if he injures an elbow—potentially down the road 5 or 6 years, can come back at us with a permanent partial disability. I guess I haven't answered your question very well. About all I can indicate is that there are some costs that we have a very difficult time controlling such as insurance premiums. The ones that we do—that we can control—are how we educate kids.

Senator KASTEN. Yes.

Mr. OPSAHL. And in that article our initial budget looked at the possibility of an 11-percent increase. But, of course, that is not going to occur, either. The last meetings the board has had, that has been reduced significantly. However, insurance costs are not reduced. We are still going to have to pay those increased premiums.

Senator KASTEN. Let me just followup, then. The Merrill Superintendent, Thomas Strick, was quoted as saying that money is being diverted from education to insurance. What educational programs might suffer as a result of these huge hikes in liability insurance?

Mr. OPSAHL. Well, as an example, we have some people that are retiring this year, teachers. They are not going to be replaced. That means that there will be larger class sizes because teachers that are remaining are going to cover those openings. Those retiring teachers are not going to be replaced—that is what he meant by stating educational programs will suffer. That sort of thing is going to occur.

Senator KASTEN. Mr. Brockhaus, and you might want to put these microphones in between the two of you so that you can both be heard, but, Mr. Brockhaus, the charts that you have and the statistics that you put out are very alarming in that they illustrate how small businessmen are hurt the hardest by the ongoing crisis. I am referring to the charts in your testimony.

In your comparison of rates between 1981 and 1986, CPA firms with more than 10 partners saw an increase of 448 percent. Now

that's enormous. However, firms with less than five partners suffered much more. Their increases were close to 1,000 percent.

Now I would not necessarily think of 10 or more as a huge number of people in a firm, but the point that 10 partners or more saw an increase of 448, but the firms with less than 5, the real small firms, are the ones that saw their rates increase at a rate of almost twice what the so-called larger firms were.

Now I don't know what would happen if we got into Chicago or New York or even Milwaukee or Madison, where they have got firms with 50 and 100—whatever—partners; maybe their rates did not go up that much at all, I do not know. They——

Mr. BROCKHAUS. They have.

Senator KASTEN. They have, also, but the point is, what is happening, particularly to these smaller offices, where the younger, let us say, the young entrepreneur decided to break away from Arthur Andersen or break off of Peat Marwick, or whatever it is, and starts his own little business, and now he is the one that is—the huge cost of insurance, and maybe it is making it impossible for him to realize his dream of running his own small accounting practice.

Have any of these small offices with one or two or less than five accountants just, as far as you know, thrown in the towel and just given up, gotten out of business? I would guess that some of these are the ones that, in fact, have said, "I cannot do this; therefore, I am going to go without insurance."

Mr. BROCKHAUS. That is correct.

Senator KASTEN. Are we going to suffer from a lack of competition as a result of this whole crisis that we are faced with?

Mr. BROCKHAUS. It is possible. I do not see that as a problem right now, although some smaller practicing units are seeking mergers with bigger firms because of this crisis. You do not sleep too well at night without any liability insurance. But I think the entrepreneurial spirit is very strong yet, and people will probably go without coverage rather than throw in the towel, would be my gut feeling.

Senator KASTEN. Now that first claim could not only put their business out of business, but also could take the dollars for their child's education or could be taking the money for their house, I mean, whatever. Because when they go at them now, they are not going after the insurance policy; they are going to be going after, I would guess, the personal assets of the one or two partners in this small firm?

Mr. BROCKHAUS. That is correct. And we have not seen that happen yet. But it will. And once that starts to happen, then I think a lot of people, small practitioners, would reevaluate their situation and either throw in the towel or perhaps go to work for industry or a larger CPA firm.

Senator KASTEN. Well, I am also hopeful that that is not going to happen because we are going to be able to deal with this legislatively. But I would guess that we are not able to deal with this legislation, and we do see this occurring because you would not be unique. I mean, this is happening to small practices of doctors, small practices of lawyers, small practices of accountants, management consultants, engineers, architects. This is happening all

through our society. And I think at the point where that starts to happen, you are just going to see, if we do not have a wild fire right now, we are going to have it then, and people are simply going to demand that the Government move in and do something about this injustice.

It is clear that the amount of money going to insurance for your area has just gone through the roof for your membership, and you have pointed that out. Is your office swallowing the cost of these insurance increases, or, in effect, are we passing this on to every one of the customers of the CPA firms that you serve? I am asking you personally with your increase. And how does what you are doing compare to what others are doing around the State?

Mr. BROCKHAUS. I wish we could pass it all on, but in the real world, that is not possible. And competition is very adequate in the accounting profession today. What bothers me, though, is if firms who drop their coverage, they could be much more competitive than people who try and maintain liability coverage and incur those costs. But, by and large, I think the typical practitioner is going to eat a good chunk of the increased insurance cost. There is just a limit, you know, what your clients will stand in the way of fee increases.

Senator KASTEN. Well, let me thank you both very much for your testimony here this morning. As I said before, your testimony will appear in the record as if read, and the record will remain open for 2 weeks. We thank you very much for your testimony, both of you gentlemen.

Our next panel includes Mr. Robert Vlasek of Tomah. Mr. Vlasek is representing himself as the owner-operator of a bowling alley in Tomah, but also is the chairman of the Wisconsin Bowling Proprietors Insurance Committee.

I would also like to ask Mr. Hensel—I believe we will have additional time to hear from the statement from the American Pulpwood Association, and, Mr. Hensel—Mr. J.S. Hensel, if you could come forward, also, and sit on this panel. We will substitute Mr. Hensel for Mr. Gleichert, who is the vice president of Human Resource of Jerome Foods. Mr. Gleichert was unable to be with us today. He was planning to be here and participate in the hearings.

Jerome Foods is in Barron. Among other things, they produce turkeys. But we will hear from his testimony, and let us go foward now with Mr. Norbert Vlasek of Tomah. As I said, in addition to his being the owner-operator of a bowling alley in Tomah—what bowling alley is that?

Mr. VLASEK. Vlasek Lanes.

Senator KASTEN. Vlasek's Lanes in Tomah. He is the chairman of the Wisconsin Bowling Proprietors Insurance Committee.

Mr. Vlasek.

STATEMENT OF NORBERT VLASEK, CHAIRMAN OF THE INSURANCE COMMITTEE, WISCONSIN BOWLING PROPRIETORS, TOMAH, WI

Mr. VLASEK. For the last 15 years, the Bowling Proprietors Association of Wisconsin has had an association insurance plan with Frank B. Hall Co. of Wisconsin. This was a complete all-risk pack-

age policy written with one company, covering fire and casualty, $500,000 broad-form liability, business interruption, and so forth. Replacement cost insurance, liability umbrella, money and securities, and liquor liability were optional coverages and were available.

During the first 9 years, rates were fairly stable, and rates were about $200 to $400 per lane. For the period of 1980 to 1984, insurance premiums actually decreased to about $100 to $300 per lane due to the highly competitive insurance market at that time.

During the 15-year period, our loss ratio has been from 15 to 24 percent and has averaged just under 20 percent for the entire period. In 1983, Frank B. Hall came up with a dividend return safety plan with the Crum and Forster Insurance Co. This was possibly because of our excellent loss ratio. At this time there were over 200 bowling centers in the association insurance plan. For 1985 premiums increased to $400 to $600 per lane. I have a 12-lane center, and my insurance premiums went from $1,800 to $5,200.

In July 1985, we were notified that Crum and Forster was canceling the association insurance plan even though our loss ratio remained at about 20 percent. All present policies remained in effect but would not be renewed, and they would not write any new business.

While policies come due at different times of the year, most of the policies come due from January 1, 1986 to July 1986. About 10 centers came up for renewal before January 1, and Frank B. Hall was able to place them with other insurance companies. Frank B. Hall tried during this period to find another insurance company to take over the association plan. However, as of January 1, 1986, there were 75 centers up for renewal, and they were not able to place the coverage. I was one of those centers.

They advised us to try our local agents on an individual basis and if not successful to apply to WIP, or the Wisconsin Insurance Plan. Nearly everyone had to apply for this coverage. This is a very limited coverage and is not adequate protection. Money had to be sent in with the application for a binder, without knowing what the cost of the policy would be.

On January 15, 1986, Frank B. Hall lined up companies to cover the centers. They issued binders to cover the centers and recalled the binders from WIP. However, our insurance premiums went up dramatically. Premiums increased 200 to 300 percent or from about $1,200 to $2,000 per lane, and the insurance coverages were not nearly as good. We went from replacement cost to cash value, higher deductibles, no liquor liability, and the liability umbrella was not available.

Frank B. Hall could furnish some liquor liability on an individual basis and much higher rates. I was able to place my insurance locally, so I am not with Frank B. Hall at the present time. My coverage also went from replacement cost to cash value. My liability umbrella went from $5 million down to $1 million. My other coverages remain the same. My premium increased from $5,200 to $15,000.

Senator KASTEN. That was for the same coverage your premiums tripled?

Mr. VLASEK. Less coverage.

Senator KASTEN. Less coverage.

Mr. VLASEK. You see, my umbrella went from $5 million down to $1 million, and my fire went from replacement cost to cash value.

Senator KASTEN. But you went from 5 to 15,000——

Mr. VLASEK. I did, for premiums.

Senator KASTEN [continuing]. For your premiums?

Mr. VLASEK. Five to 15,000; that is right. These increased costs of insurance come at a bad time for bowling centers. We set our price for bowling season in August and cannot change our prices during the bowling season. The bowling season runs from September through April.

We expected an increase in the cost of insurance but were not prepared for any increase that high. Many bowling centers are going without any liability insurance, and some are going without any insurance. Some marginal operators have gone out of business. Tom Radtke, proprietor of Radtke's Recreation of Weyauwega, WI, is going without any liability insurance. He said that everything he owns is tied up in his bowling center, and if he gets hit with a big liability insurance claim, he will just turn in his keys.

He said for the coming season he would need an increase of 50 cents per bowler per night just to cover the increased cost of insurance. He is very concerned as to how his bowlers react to this much of an increase.

Shirley Zirk, from Zirk's Lanes in Kendall, is operating with no insurance of any kind. Many bowling centers are going without a liability umbrella either because the costs are too high or because they cannot get the coverage. While all of our insurance rates have increased, the biggest increase has been in liability insurance.

We appreciate the efforts of Senator Kasten in sponsoring a bill to control the cost of awards. We feel if his bill is passed, it would take care of most of our insurance problems. The following are five related areas of concern with the tort system leading to injustice, overcompensation, and so froth. Many of these areas have been covered, but we had five areas that came through our committee, and I will go over them just briefly.

Actual damages, we feel, should be capped (sic). But intangibles, such as pain and suffering, should be capped. And we suggest no more than $200,000 limit on that type of claim. Comparative negligence should be covered, punitive damages, attorney fees.

And finally, to reduce the incidence of suit without merit and help guiltless parties defend themselves, defense costs of parties found not negligent or less negligent than the plaintiff should be borne by the plaintiffs. The rest of this is all in my report and I will not go over it in detail. These recommendations came from our committee, and we have an insurance broker and an attorney on our committee, and that is why we have probably the type of legal wording in it that is in there.

[The prepared statement of Mr. Vlasek follows:]

Vlasek's Lanes
BOX 572
210 SUPERIOR AVENUE
TOMAH, WI 54660

PRO SHOP – BOWLING
COCKTAIL LOUNGE – SNACK BAR
TELEPHONE 608 - 372-2118

For the last fifteen years the Bowling Proprietors Association of Wisconsin has had an Association Insurance plan with Frank B. Hall Co. of Wisconsin. This was a complete All Risk Package policy written with one Company, covering Fire & Casualty, $500,000 Broad form Liability, Business Interruption, etc. Replacement Cost insurance, Liability Umbrella, Money & securities, and Liquor liability, were optional coverages and were available. During the first nine years rates were fairley stable, and rates were about $200.00 to $400.00 per lane. For the period from 1980 to 1984 insurance premiums actually decreased to about $100.00 to $300.00 per lane due to the highly competive insurance market. During the fifteen year period our loss ratio has been from 15% to 24% and has averaged just under 20%.

In 1983 Frank B. Hall Co. came up with a dividend return safety plan with the Crum & Forster Insurance Co. This was possible because of our excellent loss Ratio. At this time their was over 200 Bowling Centers in the Association Insurance Plan. For 1985 the premiums increased $400.00 to $600.00 per lane. I have a twelve lane Center and my insurance premium went from about $1800.00 to $5200. In July of 1985 we were notified that Crum & Forster was canceling the Association Insurance plan, even though our loss ratio remained at about 20%. All present policies remained in effect, but would not be renewed, and they would not write any new business. While policies come due at different times of the year, most of the policies come due from Jan 1, 1986 to July 1, 1986. About ten Centers came up for renewal before Jan 1, and Frank B. Hall was able to place them with other Insurance companies. Frank B. Hall tried to find another Insurance Company to take over the Association plan. However as of Jan 1, 1986 their were 75 Centers up for renewal and they were not able to place the insurance coverage. They advised us to try our local insurance agents on an individual basis and if not successful to apply to W.I.P. or the Wisconsin insurance plan. Nearly everyone had to apply for this coverage. This is a very limited coverage and is not adequate protection. Money had to be sent in with the application for a binder without knowing what the cost of the policy would be. On about Jan 15, 1986 Frank B. Hall lined up companies to cover the centers. They issued binders to cover the centers and recalled the binders to W.I.P. However Insurance premiums went up dramatically. Premiums increased by 200% to 300% or from about $1000.00 to $2000.00 per lane and the insurance coverages were not nearly as good. We went from replacement cost to Cash Value, higher deductibles, no liquor liability, and the liability umbrella was not available. Frank B. Hall could furnish this insurance on an individual basis, and at much higher rates. I was able to place my insurance locally so I am not with Frank B. Hall. My coverage also went from replacement cost to Cash Value, and my Liability Umbrella went down from five Million to one Million. My other coverages remained the same. My premiums increased from $5200. to $15,000.

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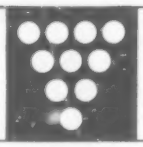

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COCKTAIL LOUNGE - SNACK BAR
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These increased cost of Insurance came at a bad time for the Bowling Centers. We set our price for the Bowling season in August and cannot change our price during the bowling season. The Bowling season runs from September thru April. We expected an increase in the cost of insurance, but we were not prepared for an increase that high. Many Bowling Centers are going without any Liability insurance, and some are going without any insurance. Some marginal operators have went out of Business. Tom Radtke, The Proprietor of Radtke's Recreation from Weyauwega, Wis. is going without any Liability Insurance. He said everyting he owns is tied up in his Bowling Center, and if he get hit with a big Liability insurance claim he will just turn in his keys. He said for the coming bowling season he would need an increase of .50¢ per bowler per night just to cover the increased cost of insurance. He is very concerned as to how his bowlers will react to this much of an increase. Shirley Zirk from Zirk's Lanes in Kendall, Wis. is operating with no insurance of any kind. Many Bowling Centers are going without a Liability Umbrella policy. Either because the cost were too high or because they could not get the coverage.

While all of our insurance rates have increased the biggest increase has been in Liability insurance. We appreciate the efforts of Senator Kasten in sponsoring a bill to control the costs of awards. We fee if his bill is passed it would take care of most of our insurance problems.

The following are five interrelated areas of concern with the current tort system leading to injustice, over compensation of plaintiffs or attorneys, or over utilization of the system. They stem from the fact that the system has been revolutionized by the legal industry from a system to redress damages caused by negligence to a "benefits for the injuries" system with little regard to negligence. The negligence aspect even now is only marginally retained to keep the system under the control of the legal industry and court system. If it is socially desirable to compensate all victims of injury, then crime victims should be included and compensation determined by a structured benefits system and not a conflict resolution system.

We feel the following changes would go far at resolving the problems of the current system, reintroducing elements of justice back into the system while alleviating overutilization and overcompensation of attorneys and victim.

1. Actual damages should be uncapped to the victim but damages for intangibles such as pain and suffering and loss of companionship should be capped. We suggest no more than $250,000 per person injured as justifiable and adequate as a maximum.

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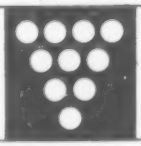

PRO SHOP – BOWLING
COCKTAIL LOUNGE – SNACK BAR
TELEPHONE 608 - 372-2118

2. Comparative negligence is a positive application of law making a party responsible for damages equal to his proportion of negligence but the precept of joint and several liability should not operate to make the financially prudent party more responsible for damages because of his financial prudence. This is unjust. No party should be responsible for a greater percentage of damages than his actual percentage of negligence, regardless of the ability of other negligent parties to bear financial responsibility for their actions. Along the same line, if the plaintiff is found more than 50% negligent in causing his injury, he should bear the financial responsibility for it.

3. Punitive damages in a jury system tend to be a lottery. They should only be paid where there is an indication of conduct regardless of life of conduct which indicates injury was intended. They should be paid to the government or court system to pay for the system or policing to reduce the potential for further irresponsible behavior. No attorneys fees should be payable on punitive damages. They should be capped at the amount of actual damages for conduct regardless of life and twice actual damages for situation where an intent to injure is shown.

4. Attorney fees should be limited to reasonable levels. Contingency fees do allow for access to the judicial system for all parties and should be retained. At the same time, the lack of structuring for their application allows for abuse and incentive for pursuit of frivolous claims. They should be statutorily set and should not be applicable to punitive damages. They should be considered a necessary expense of the plaintiff and be recoverable as damages by the plaintiff based on the application of comparative negligence. We would suggest a sliding scale, so that smaller grievances will still remain attractive for pursuit of justice with attorneys, as follows.
   25% of the first $500,000 of damages
   20% of the next $500,000
   10% of the next $2,000,000
   5% of the next $2,000,000
   1% on all damages over $5,000,000.

5. Finally, to reduce the incidence of suit without merit and help guiltless parties defend themselves, defense costs of parties found not negligent, or less negligent than the plaintiff, should be borne by the plaintiff.

Senator KASTEN. I am not a lawyer, either. Mr. Hensel has a brief statement. And then I will ask questions, as I did of the previous panel, to both of you. Mr. J.S. Hensel is Lake States and Western Division Forester of the American Pulpwood Association.

Mr. HENSEL.

STATEMENT OF J.S. HENSEL, DIVISION FORESTER, AMERICAN PULPWOOD ASSOCIATION, INC., WAUSAU, WI

Mr. HENSEL. Thank you, Senator. I will omit reading the forepart of my statement in view of the fact that you have a copy of it. I would like to read a portion of it.

Senator Kasten: You might want to get the microphone closer to you so that you could be heard.

Mr. HENSEL. One of APA's primary objectives is to support logging contractors and provide information, programs and activities leading to a safer, more secure, more attractive climate for woods work in order to assure a continuing opportunity for employment of individual entrepreneurial skills in the harvesting and transportation of forest products.

Our insurance industry faces a crisis of major proportions, one that threatens its very existence. Without insurance, every business, local government, school district, police department, professional and private citizen, stands naked and defenseless before an array of nameless perils.

Perhaps one of the most vulnerable of all groups are the loggers. In effect, they are the lifeblood of Wisconsin's pulp and paper industry. It is not that these people are reckless or unaware of the danger they are in. The simple fact is they either cannot afford insurance or are unable to obtain it at any price. Yet that is precisely what is happening today, as more and more businesses, governments, professionals, and yes, loggers attempt to function without insurance, a hazardous procedure known as "going bare." They simply continue, hoping against hope, that they will not fall victim to a lawsuit or action that will mean their ruin.

APA is a charter member of the American Tort Reform Association. ATRA is the lead coalition in improving liability insurance cost and availability through reform at the State and national level in the laws which govern liability awards in the courts.

Our goals, in general, are; One, develop uniform standards of liability for our litigated cases which are consistent with the principle that those who are responsible for harm to the person or property of another are required to do justice, to the extent of that responsibility, to offset the harm they have done.

Two, reform rules of damages particularly as they relate to noneconomic loss and punitive damages.

Three, reform rules of joint and severable liability, contribution, and claim reductions.

Four, provide for determination of medical, scientific, and technological issues by independent expert bodies rather than by law juries.

Five, develop cost-effective alternative mechanisms to the use of private litigation for dispute resolution.

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And, six, reduce transaction costs by regulating contingent legal fees.

Wisconsin loggers have a good experience in risk retention and workmen's compensation and obviously need help in getting general liability and inland marine insurance.

APA also supports the Kasten bill S. 2129, which would amend the Product Liability Risk Retention Act to make it easier to form collective purchasing groups for general liability coverage.

I do not have this in my presentation, but I would like to make just one short comment. We have heard all sorts of facts, figures, numbers, graphs. Less than 2 months ago, I talked with a small logging equipment manufacturer here in the State of Wisconsin. I don't feel free to give the numbers, but, nevertheless, his statement was, in effect, "I can no longer afford to stay in business if I carry insurance."

I asked him a little bit further, and what did he say? He said, "My business is so small that the increase in my product liability insurance is and will be more than the profit I make."

I asked him, "What is your solution?"

He said, "There are two. One, go out of business. The other, hire a good tax expert so I can get my business transferred to my wife's name or some other such business, make my assets and liabilities almost equal, and if I get sued for it, you got the business."

[The prepared statement of Mr. Hensel follows:]

Marathon County Court House
Wausau, Wisconsin

May 30, 1986

STATEMENT

COST & AVAILABILITY OF LIABILITY INSURANCE
FOR SMALL BUSINESS HEARING

BY

J. S. Hensel
Lake States & Western
Division Forester
American Pulpwood Association Inc.
3303B Terrace Court
Wausau, Wisconsin 54401
(715)842-3471

ON BEHALF OF

THE AMERICAN PULPWOOD ASSOCIATION INC.
1025 Vermont Avenue N.W.
Suite 1020
Washington, D. C. 20005
(202)347-2900

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* The American Pulpwood Association commends Senator Kasten for scheduling a hearing on the, "Cost and Availability of Liability Insurance For Small Business".

* The American Pulpwood Association is the only national trade Association representing producers, suppliers and consumers of pulpwood in the United States. APA functions to promote the best interests of wood fiber suppliers and consumers in the economical, efficient and wise stewardship of our forest resources through the private enterprise system to meet the nation's needs.

* One of APA's primary objectives is to support logging contractors and provide information, programs and activities leading to a safer, more secure, more attractive climate for woods work in order to assure a continuing opportunity for employment of individual entrepreneurial skills in the harvesting and transportation of forest products.

* Our insurance industry faces a crisis of major proportions, one that threatens its very existence. Without insurance, every business, local government, school district, police department, professional and private citizen stands naked and defenseless before an array of nameless perils.

* Perhaps one of the most vulnerable of all groups are the loggers. They are the lifeblood of Wisconsin's pulp and paper industry. It isn't that these people are reckless or unaware of the danger they are in. The simple fact is that they either cannot afford insurance or are unable to obtain it at any price. Yet that is precisely what is happening today, as more and more businesses, governments, professionals and, yes, loggers attempt to function without insurance, a hazardous procedure known as "going bare". They simply continue, hoping against hope that they will not fall victim to a lawsuit or action that will mean their ruin.

* APA is a charter member of the American Tort Reform Association. ATRA is the lead coalition in improving liability insurance cost and availability through reform at the state and national level in the laws which govern liability awards in the courts.

* Our goals, in general, are to:

  1. Develop uniform standards of liability for litigated cases which are consistent with the principle that those who are responsible for harm to the person or property of another are required to do justice, to the extent of that responsibility, to offset the harm they have done.

2. Reform rules of damages, particularly as they relate to non-economic loss and punitive damages.

3. Reform rules of joint and severable liability, contribution, and claim reduction.

4. Provide for determination of medical, scientific, and technological issues by independent expert bodies rather than by law juries.

5. Develop cost-effective alternative mechanisms to the use of private litigation for dispute resolution, and

6. Reduce transaction costs by regulating contingent legal fees.

* Wisconsin loggers have a good experience in Risk Retention and Workmen's Compensation and obviously need help in getting general liability and inland marine insurance.

* APA also supports the Kasten Bill S2129, which would amend the Product Liability Risk Retention Act to make it easier to form collective purchasing groups for general liability coverage.

Senator KASTEN. Thank you for your testimony. And, unfortunately, the example that you just cited is a route that some people are choosing to take. Because what we have seen is the opposite of that occurring, that a small business because they are not necessarily large, and do not have large assets, would not become a target for the trial lawyers and for the litigation. Sometimes that same exact small business is then bought by a larger company, a larger corporation, and all of a sudden now they are a division of XYZ Corp., and there is a deep pocket, and all of a sudden the trial lawyers begin now to target in on the products of that particular company because there's a deep pocket.

In the same way, I mean they are looking at the assets, and where they see that there is an opportunity, that is where they go. And people are taking that kind of a route, and, actually, Mr. Vlasek, in—and you might try to split the microphones between the two of you now, you mentioned in your testimony Mr. Radtke—I think it is Tom Radtke from Weyauwega, he filled out one of our questionnaires, and maybe you did, too. I do not know.

Mr. VLASEK. I did.

Senator KASTEN. We mailed these small business questionnaires to small business people throughout Wisconsin. And he said, as you did, that he's considering going out of business because his insurance premiums went up 400 percent, and now it has been canceled. He also said that the liability crisis is, "definitely going to force some small businesses out of business in the next few years." Is he atypical, or is he typical? Are there a number of people that right now are on the edge, a number of bowling proprietors that you know that are—that are on the edge?

Mr. VLASEK. Well, I would say that an awful lot of them are going without liability insurance because of the increased cost. Our loss ratio has been practically negligible. We have had hardly any claims, and a lot of them think they can get by. The bowling business has not really been all that great, you know, for the last 7, 8 years; it has been down slightly, has not been increased. And when you start looking at an increase of 50 to 60 percent—50 to 60 cents a night per bowler, 15 to 20 cents per line of bowling, it is quite substantial, and I know I myself am very reluctant to think that I can pass all the cost off. I am sure——

Senator KASTEN. That was my next question because this was in Tom Radtke's testimony—I mean in his questionnaire—he indicates that he has lost two leagues because he tried to pass on the added expense of his product liability insurance on to the consumers, and as a result of that, two leagues just decided that they could not afford it.

How much of the flat fee—we had testimony from one of the ski hills, it was Cascade Mountain down closer to Madison. I would guess the same would be true of Rib Lawn, and we were trying to figure out what percentage or what cost of the lift ticket was in liability insurance. And one of the problems that Cascade Mountain had was that they could not pass it on, but they were over, I think $1.50, $2 on a ticket that was $14 or $16.

Where are you? How much does it cost? I do not want to get into the proprietary information on your—you know, detailed information on your bowling alley itself, but of the cost, how much now is

in liability insurance, and how much would you have to pass on in order to cover the increases? Can you just give us some kind of ballpark for your industry maybe or whatever kind of numbers you'd be most comfortable with?

Mr. VLASEK. I would say with the present rates the way they are—and that is not allowing for any increase the first of the year; most policies come due the first of the year—I would say that about 75 cents per line is going for insurance right now—not per line, for three games, 25 cents per line, 75 cents a night. They bowl three games, and I would say 25 cents a line would probably be what would be necessary to cover insurance costs. That would be a liability umbrella and everything as far as——

Senator KASTEN. And can proprietors pass these costs on easily?

Mr. VLASEK. No, no, it is almost impossible to pass the entire cost on. They have got to absorb part of it or operate with less help and things like that is what we have got to do. In Tom Radtke's case, he is considering going out of business of it. But he was considering going without any insurance at all. But, of course, he knows the banks will not let you do that, and he had to get fire and casualty. That is the only insurance he has right now.

Senator KASTEN. Mr. Hensel, do you have any way of expressing the answer to the same question in your area? Can you express in any way the cost and how it is working its way through to consumers?

Mr. HENSEL. I do not.

Senator KASTEN. I know that would be particularly tough to do in your business, that you can look at an individual logger or logging company, and you can look at the increase but it is hard to——

Mr. HENSEL. I am a little privy, of course, to a good bit of private information, so I would rather not exactly stipulate to numbers, but I do have some comments I would like to make about some of the discussions that is revealed here. A gentleman from the Merrill School mentions the fact that yes, they are talking about teachers retiring and not being replaced.

But, in my judgment, this is a very short-term solution. This does not solve the insurance problem. The fact is it may even add fuel to the fire. If you can meet your costs, your operating costs, which include increase the insurance premiums by cutting down on the other end of the scale here, you really have not accomplished very much. But we need some legislation that will put a halt to this increase.

Senator KASTEN. The effort that we are making—first of all, I would like to thank you very much for your testimony. The effort that we are making in Washington is coming from two different fronts. The one is to solve what we believe is an insurance problem and that is for certain groups of people; insurance companies are no longer making insurance available. Therefore, we have passed the Risk Retention Act, and I am pleased that one of you referred directly to that legislation——

Mr. HENSEL. We approve.

Senator KASTEN [continuing]. In your testimony. That's the Risk Retention Act Amendments of 1986. In a sense what it does is it allows groups to form risk retention groups on their own, and, in

effect to self-insure as groups so that if they are not satisfied with the rates that they are getting from the insurance companies, they simply put together their own group in competition with the insurance companies, and we allow them to compete. That is something that has not been available to people, and I think that that is something that's going to be very important in terms of dealing with the question of whose fault this is.

But we have to also do something with the underlying problem, as you suggest, with the increase in court cases, with the ever more litigious nature of our society, and with some kind of common sense and reasonableness as to the kind of suits that are brought. That effort is the Tort Reform Act, and that effort is the effort that I am working on.

At noon today the President is making a speech, and sitting with the President are going to be groups such as the Boy Scouts of America, small business groups, locai government officials, nurse midwives, school bus operators—a whole group of people with the President at his speech this noon—which he is going to endorse the legislation that we are coming forward with. Our legislation would do the things that you have mentioned here, number one, establish a uniform standard nationwide because right now the fact that it is one way in Washington and one way in Oregon and one way in Maine and one way in Massachusetts and another one in Wisconsin means this patchwork with State laws although it does not directly affect the bowling operators, it does indirectly because the patchwork of State laws, you end up with a send of—because the different laws and different states of increasing the transaction costs, the iegal fees in all of the different states because there is no uniformity, and we need uniformity.

The second thing it does is it starts to limit noneconomic damages, and I think it is important that we do that. We want to reward people, we want to compensate people for economic loss. That includes medical expenses, all of the even future wages. The whole area—people must be—we do not in any way want to limit an individual's opportunity to collect what is due them, and our legislation does not do that.

Finally, we deal with the problem of more and more dollars going to the lawyers and fewer and fewer dollars going to the injured person. What we are saying is that we want to establish a fee system. Right now the lawyers get between 25—excuse me, between 33 and 45 percent of the total claim, whether that claim is $100 or a $1 million. They get between 33 and 45 percent.

What we are saying is let us start to limit that so that more dollars go to the person who is injured and fewer dollars go to the lawyer. Take the incentives out for the lawyer. And what we are doing is saying the lawyer can get 25 percent of the first $100,000, 20 percent of the second $100,000, 15 percent of the third $100,000, and after that, 10 percent of all the additional fees. The lawyer will be more than adequately compensated, but more of the dollars go to the person that is hurt as opposed to the person that brings the suit.

This is the direction that we are going, and it has come through now with more and more support from small business especially, but also groups that have nothing to do with small business.

I just want to make one other comment, and that is that it is our society that is paying the price. Three years ago we had four different people who were in the manufacture and distribution of the measles vaccine. Today we have one manufacturer and producer of the measles vaccine left in America and their insurance expires in July. The measles vaccine has been so good that most of us have never known an outbreak of measles in any geographic area anywhere in the United States of America or most of the Western World. But 1 out of 10 million has a reaction to that vaccine. Because that one has been a very costly expense to the makers of the vaccine and the manufacturers of the vaccine and the vaccine has never been a profitable item for these companies, they have now stopped manufacturing the vaccine. Three out of four have stopped it. Only one left.

Where are we going to be as a society if something that works for 10 million people is taken off the market because we as a society are unable to work out a fair way to compensate that one person that has been injured? And that is the challenge, and that is the direction that we are going in our legislation. I would like to thank both of you for your testimony here today. As I said before, your entire statements will be made part of the record, and I appreciate your statements very much.

We will ask that the record remain open for 2 weeks. We have a number of statements of individuals who have asked to submit statements for the record for this hearing. We will take those statements that have been submitted by some in the audience and some that were unable to be here today, and, in addition, the record will remain open from 2 weeks from this hearing for additional statements to come to us for the record.

The insurance crisis has a strong grip around the necks of small business, tourism, recreation, and government. If anyone had any doubts about the magnitude of this problem in this part of our State before today and about who it has been affecting, I think it should be painfully apparent that all of us are suffering as a result. The time has come to put brakes on the runaway legal system before it ruins our entire economic system. Only through tort reform, in my view, are we going to be able to stop this runaway problem.

I thank you all for your testimony, and we look forward to working with you. This hearing is adjourned.

[Whereupon the hearing of the Senate Small Business Committee came to a close at 10:10 a.m.]

A P P E N D I X

COMMENTS OF THOMAS E. VANDENBERG

LEGAL COUNSEL

SCHNEIDER NATIONAL, INC.

APRIL 7, 1986

GREEN BAY, WISCONSIN

My name is Thomas E. Vandenberg and I am Corporate Counsel for Schneider National, Inc. Schneider National is involved in a number of different businesses, but is probably best known as one of the nation's largest irregular route truckload motor carriers. The Schneider National carriers operate throughout all 48 of the continental United States and Canada. Our 5,300 drivers and employees, 4,300 tractors and over 9,600 trailers move well in excess of 10,000 truckload shipments per week. During 1986 our drivers will drive nearly 500 million miles. Considering the nature and extent of our trucking operations and other business interests, it's apparent that we are vitally interested in what has come to be known as the "insurance crisis".

Schneider National maintains insurance coverage that we consider prudent given the nature and extent of our operations that is well in excess of the amounts required by federal and state agencies. The cost of that coverage increased approximately 100% during 1985 and another 95% in 1986. For a carrier the size of Schneider, these increased insurance costs amount to literally millions of dollars.

Deregulation, the recession, and substantial excess capacity in the trucking industry have created a competitive environment

that makes it impossible to pass these costs on to the shipping public.

The way we view it, there are really two aspects to the insurance problem. The first involves the present plight of the insurance industry itself, as well as the nature of that industry. The second, the civil justice system.

Changes in the way the insurance industry is regulated may be needed. The primary goal of any change should be to make insurance coverage available at a reasonable cost to any qualified buyer and to eliminate the cyclical variations in rates that have resulted from the insurance industry's "feast or famine" approach to the business.

While the crisis that presently exists is certainly the worst that anyone can remember, the insurance business has been cyclical for years. The present crisis is intolerable, given the importance of insurance to all of us, and should not be allowed to occur again. Unfortunately, we are not experts in the insurance business and have few specific suggestions to offer concerning the changes that would be required in order to address this aspect of the problem. As a representative of a trucking company that favors deregulation, we are reluctant to propose further regulation of the insurance industry, but believe that it may be required in order to find a permanent solution to the present crisis. We do not believe that changes the insurance industry has proposed, i.e., "claims made" policies and total elimination of certain types of coverages are necessary or appropriate.

We are probably more qualified to address the second aspect of the problem - the civil justice system. Contrary to what certain members of the Bar (primarily those who have profited handsomely from the present civil justice system) would have us believe, the blame for the present insurance crisis cannot be laid solely at the door of the insurance industry. Our civil justice system and the lawyers and judges who've allowed that system to get totally out of hand are also to blame.

We believe that substantial reform of the civil justice system will be required as part of any permanent solution to the insurance crisis. Who among us hasn't read about multi-million dollar settlements and totally outrageous cases. A recent Wall Street Journal editorial (Wall Street Journal, 12-3-85) featured some examples. One involved an insurance company ordered to pay $260,000 plus $1,500 a month to a plaintiff injured when he fell through a skylight while trying to rob a school. Another involved a company that designed telephone booths that was found liable to a man injured when a drunk driver crashed into one of its booths.

We would find tales such as these amusing if it weren't for the fact that our company has also been victimized by the "deep pocket" mentality so common among today's jurors. Unfortunately, justice is not blind; those with "deep pockets", corporations, municipalities, and states are almost always required to pay more than individuals.

Liberalization of rules governing advertising by lawyers and competition among an oversupply of lawyers competing for the same contingent fees has produced what is commonly recognized to be

the most litigious society in the world. What all of us, from the largest company down to the individual consumer, need to understand is that each of us ultimately shoulders the cost of this expensive, inefficient, and frequently unjust civil justice system.

There are many changes in the system that would help alleviate the existing crisis. What follows are a few that we advocate:

1. Greater use of alternative dispute resolution mechanisms. More cases need to be disposed of on an expedited basis by means of less formal, mandatory and binding arbitration.
2. Class actions. While class actions are an important tool, the class action process is frequently abused and often used as a threat to gain settlement leverage. Abuses of class actions should be curbed.
3. Joint and several liability. States like Wisconsin that have adopted the concept of comparative negligence still follow the principle of joint and several liability. The concept of joint and several liability should be eliminated. The negligence of employers in cases involving on-the-job injuries should be apportioned and any recovery from other defendants reduced to the extent of a co-defendant employer's negligence.
4. Contingent fees. Contingent fees should be eliminated or capped. Moreover, in cases prosecuted for

a contingent fee, a losing plaintiff and his/her attorney should be responsible for the defendant's costs, including attorney's fees. Full client disclosure, similar to truth in lending statements, should be required.

5. Discovery. Discovery abuses should be curbed.

6. Prejudgment interest. Proposals to allow prejudgment interest should be rejected.

7. Pain and suffering awards. Pain and suffering awards should be capped.

8. Punitive damages. Punitive damages should not be awarded in a civil suit unless intentional behavior constituting a crime is established beyond a reasonable doubt.

9. Workers compensation. Reform of the workers compensation system is required in order to curb abuse and to avoid yet another "insurance crisis".

10. Mandatory settlement conferences. Plaintiffs and their lawyers should be obligated to make a good faith effort to settle their claims before resorting to litigation. This requirement should be jurisdictional, i.e., mandatory before a suit can be filed.

11. Collateral source rule. The collateral source rule should be abolished. Juries should know all of the facts, including the availability and source of alternative compensation and employers should be able to collect from a plaintiff-employee medical

expenses paid-out under the employee's medical plan if the plaintiff-employee ultimately recovers from a third party.

12. Frivolous lawsuits. Statutes governing frivolous lawsuits should be strengthened and judges required to award costs and attorney's fees to a defendant subjected to a frivolous lawsuit. Both the plaintiff and the plaintiff's attorney(s) should be liable for such an award.

We also believe that a whole new attitude toward insurance in the civil justice system will be required in order to solve the existing crisis and suggest that consideration be given to equitably reducing insurable risks wherever fair and appropriate. For example, Wisconsin recently rejected a mandatory seat belt law. It will undoubtedly be reconsidered soon. We believe that this would be an appropriate method for reducing potential liability in accident cases. A number of people who support and oppose the mandatory seatbelt law have indicated that it may be practically unenforceable. We believe such a law would be virtually self-enforcing if those who chose not to use their seatbelts knew that their ability to recover in the event of an accident would be appropriately restricted. Such a restriction or limitation on liability would be fair and equitable, and consistent with the traditional assumption of risk and negligence doctrines.

In summary, we understand the complexity of the problem and how difficult it will be to solve. However, the sooner we start the sooner the crisis that exists can be alleviated. Insurance

is vital to all of us, government, large and small businesses, and individuals. It is essential that insurance be available at a fair and reasonable price. Both aspects of the problem outlined above will have to be promptly addressed in order to achieve these goals.

TEV/bmd

7/COMMENTS/040786

TESTIMONY ON INSURANCE LIABILITY CRISIS
SENATE SMALL BUSINESS COMMITTEE (U.S.)
Monday, April 7, 1986
Green Bay City Council Chambers

Good morning. My name is Susan Garot and I'm the public affairs director for the Green Bay Area Chamber of Commerce.

We are all concerned about the soaring cost of liability insurance premiums. We have members whose rates are doubling, tripling, some even goingup by four times or more. Many of these business and professional groups cannot afford these premiums and are facedwith the prospect of "going bare," that is without insurance. Others are being cancelled.

In the case of our Chamber of Commerce, our directors liability insurance has increased 223% in the past year, while our coverage amounts were decreased to one-third of the level they were in 1985.

Last fall we held a breakfast program on the insurance crisis. Every one of the nearly 75 people in attendance agreed that something needed to be done. Soon after that our board adopted a position paper supporting broad-based changes to our civil justice system, including:

1. An education program making the public aware of the cost to everyone of the present civil justice system and the need for substantial reform.
2. Placing a cap on damages awarded for pain and suffering in personal injury cases. This includes mental and emotional trauma as well as physical discomfort and distress.
3. Eliminating the concept of joint and several liability and provide for the apportionment of negligence to employers for employee injuries covered by workers' compensation and in such cases a reduction of any award a third party may be required to pay to the extent of the employer's negligence.

4. Cap or eliminate lawyer's contingent fees.
5. Pursue and encourage the use of alternative dispute resolution techniques wherever appropriate.
6. Curb abuses of class action suits.
7. Strictly limit or eliminate punitive damages.
8. Oppose the award of prejudgment interest.
9. Reform federal product liability laws to bring uniformity to state laws.
10. Require mandatory settlement conferences before parties may resort to litigation.
11. Consider a rule that would permit disclosure of monies already paid to a plaintiff from other sources in order to prohibit double payments from being made.
12. Substantially strengthen statutes governing frivolous lawsuits and require judges to award parties subjected to a frivolous lawsuit all costs and attorneys' fees.
13. Oppose new proposed standard form insurance policies that provide for claims-made coverage and exclusions that would interfere with the flow of necessary goods and services.
14. Reform the UC and WC systems in order to cub abuse and to avoid yet another dimension to the "insurance crisis."

It's gone beyond the time we need to do something about this crisis and I thank you for allowing people from around our area and around the country to testify confirming this crisis and for your consideration for helping us seek solutions.

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ERVIN CONRADT
Rt. 2, Shiocton, WI 54170

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Wisconsin Towns Association

A COOPERATIVE ENTERPRISE FOR BETTER LOCAL GOVERNMENT

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MEMO

To: Hon. Robert Kasten
U. S. Senate

From: Ed K. Krueger, Executive Director
Richard J. Stadelman, General Legal Counsel

Re: Liability Insurance Crisis Facing Wisconsin Towns

Date: April 7, 1986

On behalf of Wisconsin Towns Association, we wish to thank you for allowing us the opportunity to express our concerns about the liability insurance crisis facing Wisconsin towns. There is a crisis facing towns!!! It is imminent!!! As of May 1, 1986 towns insured by the Towner Ins. Co., a Wisconsin carrier with headquarters in Milwaukee, who have an annual renewal as of May 1, 1986 or after will be nonrenewed on their renewal date. Those towns having their annual renewal in May have already received their notice of nonrenewal from Tower Ins.Co. Those towns having their renewal in future months will also be receiving nonrenewal notices in the near future. In all about 900 towns of the 1267 in the State of Wisconsin who are currently insured with Tower Ins. Co. will have to find a new carrier in the next year.

A brief history of the towns insurance program will follow in this memo. Second, a discussion of some of the legal issues of municipal liability for towns. Finally, some personal comments and thoughts concerning possible legislative action to help relieve the situation.

HISTORY OF WISCONSIN TOWNS INSURANCE PROGRAM

The Wisconsin Towns Association was organized in 1948 in Adams Co. Over the first years of the Association liability insurance was not a concern because the legal principle of sovereign immunity protected towns in most part from liability. However, in 1961 the Wisconsin Supreme Court abrogated the sovereign immunity theory in the case of Holytz v. Milwaukee, (1961) 17 Wis. 2d 26. Since that time through

court decisions and legislative changes towns as well as other levels of local government have had their exposure to civil suit greatly expanded. Liability insurance became a must for all towns to obtain to protect their taxpayers.

In the early 1970's the Wisconsin Towns Association recognizing the need to insure that adequate protection was available for all areas of municipal liability developed in conjunction with the Laub Group Inc. a complete program of various insurance coverages available for towns. The program has grown over the years to approximately 900 towns of the 1267 towns in Wisconsin being insured in part or total through the program. The types of coverage include general liability; property & casualty for buildings; motor vehicle insurance; umbrella coverage; errors and omissions coverage for the officers (including police and professional); and workman's compensation.

In the calendar year 1985, the carrier of general liability insurance under the program was Tower Ins. Co. The carrier raised premiums throughout the year. (Jan,1985 15%; July, 1985 an additonal 15%; Sept. another 20%; and Jan. 1, 1986 about 25%) Therefore the annual premiums for general liability from late 1984 to early 1986 had nearly doubled under this company. We are aware of some other carriers for general liability insurance for municipalities that even exceeded these increases to three and four times the previous rates. Also on about Jan.1, 1986, Tower Ins. Co. gave notice it would not write new coverage for any town over 5,000 in population. Tower Ins. Co. would only continue at that time those towns who already had coverage with them. Then in late February, Tower notified the Laub Group Inc.(our program administrator) that as of May 1, 1986 Tower would not renew any general liability insurance policies for any towns.

In some other specific lines of insurance, some towns experienced even more drastic increases in premiums, if they could obtain coverage at all. The Town of Menasha, Winnebago County, received notice of cancellation of their errors and omissions coverage in late summer of 1985. They were able to receive only one quote from another carrier for this coverage. Their premium in 1984 for this coverage had been $1495, however their only quote in 1985 was at $14,500, nearly a thousand percent increase.

Our association was advised that the reason that Tower Ins. Co. was pulling out of the municipal liability market entirely was because the reinsurance market had refused to write for them on this risk. We were told this was due to Lloyd's of London being concerning with the United States tort system. In the case of the increase for the premium for errors and omissions coverage for the Town of Menasha we were told it was due to the concern for the exposure from civil rights suits against their police department, even

though no claims had ever been successful against the Town of Menasha police department.

Our association knows of no major claims paid from 1974 to 1984 by the general liability carrier for towns. In 1985 two claims totalling less than $100,000 were paid from claims against towns. This nearly perfect loss record meant nothing to the reinsurance market according to the insurance experts we consulted. The bottom line was that the insurance industry was pulling in its market at the expense of local government. This same risk which was a profit maker for the last ten years, warranted no consideration from the reinsurance market.

As of this date, April 7, 1986, Laub Group Inc. does not have a commitment from another carrier for general liability for any towns with renewal dates in May. Laub has been working feverishly to obtain a new carrier in timely fashion to attempt to prevent a void in coverage such as faced twenty-three counties at the end of 1985 when Colonial Penn pulled their liability coverage.

As was said in the first paragraph of this memo, there is an insurance crisis facing town officials. Although, we do not claim to be insurance experts, our association and ourselves do believe that the blame for such a crisis rests in part on the Insurance industry and in part on the need for reforms in our civil tort system. When reinsurance coverage can be pulled at the whim and wish of a few powers to be, whether they be in the United States or in London, everyone is at risk of loosing all future coverage. Some means of protection from the abuse of a limited number of insurance moguls pulling coverage must be developed. In addition from the protection of complete sovereign immunity prior to 1961, we have gone to the concept of 'deep pocket' where muncipalities are named in every suit possible because they have insurance and they can possibly be held fully responsible under the joint and several theory of liability. Judgments in our legal system have sky rocketed to the point that reasonable premiums for insurance protection is not available.

This is a short history of where towns in Wisconsin have come in the past thirty years. It must also be remembered that even if liability insurance coverage is available in the near future the increase in premiums which expected in addition to those of the past year will be an additional burden on the real estate taxpayer, the ultimate source of revenue for towns.

CURRENT MUNICIPAL LIABILITY ISSUES

A. Tort Liability under state law

Sec. 893.80 of Wis. Statutes (previously numbered Sec. 895.43) was adopted as a legislative response to the Holytz, supra, case decided in 1961. The initial limit of liability in this section was $25,000 which was raised to $50,000, which is the current limit. This limit has been challenged several time, but has been upheld by the Wisconsin Supreme Court. Two Supreme Court decisions warrant review regarding the challenge to the limits and some insurance issues under this statute. These cases are Stanhope v. Brown County, (1979) 90 Wis. 2d 823 and Lemon V. Federal Ins. Co. (1983) 111 Wis. 2d 563.

B. Motor Vehicle Liability for Municipalities

Sec.345.05 of Wis. Statutes provides the state statute regarding municipal liability for motor vehicles. There are no limits under this statute as there are under Sec. 893.80. The Lemon case,supra, is the most recent discussion of some of the issues with regard to this section. A limit on the amount of damages under this statute would require State legislative changes which were pending in the last session just recently ended.

C. Officers personal liability

Sec. 895.35 and 895.46 of Wis. Statutes provide protections for individuals serving in elected or appointed positions for municipalities. This coverage extends as long as the officers were acting in there official capacity and within the scope of their duties. Errors and Omissions insurance is also recommended for all town officers and employees to provide funds in the event of an actual recovery

D. Antitrust Liability damages

The federal government recently passed federal legislation eliminating the possible recovery of damages in antitrust suits against municipalities. A bill (Assembly Bill 897) was pending in the State legislature, however failed to pass in the last day of the session due to the late calendaring.

E. Federal Civil Rights damages

Enclosed is a copy of testimony of the National Association of Towns and Townships (NATaT) regarding some concerns on the issue of federal civil rights claims.

F. Environmental Impairment Insurance

There is no insurance coverage available for existing town landfills or abandoned landfills. Currently about 900 unengineered landfills are operating in Wisconsin with about 700 of these sites being town sites. There are 1700 to 2000 abandoned sites around Wisconsin, which no one knows what problems could be coming from.

Comments for Possible Legislative Changes

It is clear that in order to reform the current tort liability system in the United States and the State of Wisconsin, legislative changes must be made on both the federal level and the state level. Some of the following ideas would be supported by Wisconsin Towns Association:

1. Modification of the joint and several liability doctrine to limit damages to the per cent of total damages that the negligence bear to the total negligence.

2. Caps on noneconomic damages, such as pain and suffering.

3. Caps on attorneys fees for medical expenses and other out of pocket losses.

4. Caps on municipal liability for motor vehicles.

5. Providing a good faith defense for public officials in civil rights suits.

6. Limiting civil rights suits to true civil rights actions.

In regard to the insurance industry, our association would support any attempts to provide greater stability and possibly controls. We would consider supporting the concept of providing pools for select risks as an alternative to the insurance market as traditional known.

Thank you again for the opportunity to express our thoughts on these issues. Our association stands ready to work with you and other federal and state legislators to improve the current crisis situation.

National
Association of
Towns and Townships

TESTIMONY OF THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

BEFORE THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM

TUESDAY, FEBRUARY 4, 1986

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM DAVID RUSSELL, EXECUTIVE DIRECTOR OF THE CONNECTICUT COUNCIL OF SMALL TOWNS, AND FIRST SELECTMAN OF THE TOWN OF GRANBY, CONNECTICUT. I AM TESTIFYING TODAY IN MY CAPACITY AS FIRST VICE PRESIDENT OF THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, AN ORGANIZATION REPRESENTING OVER 13,000 TOWNS, TOWNSHIPS AND SMALL GOVERNMENTS NATIONWIDE. THE VAST MAJORITY OF THE COMMUNITIES WE REPRESENT HAVE POPULATIONS UNDER 25,000. OFFICIALS IN LEADERSHIP POSITIONS RANGE FROM THOSE WHO HAVE BEEN ELECTED AND ARE ON A SALARIED BASIS, TO THOSE WHO ARE VOLUNTEERING THEIR TIME WITHOUT ANY REMUNERATION WHATEVER, AND WHO DO SO AS A SERVICE TO THEIR FRIENDS AND NEIGHBORS IN THE COMMUNITY.

MR. CHAIRMAN, WE APPRECIATE BEING INVITED TO TESTIFY HERE TODAY, AND WE FEEL THAT OUR TESTIMONY IS PARTICULARLY APPROPRIATE BECAUSE THIS CRISIS IN LIABILITY INSURANCE IS AFFECTING SMALL COMMUNITIES TO A GREATER DEGREE THAN OTHER GOVERNMENTAL UNITS -- BECAUSE WE HAVE LIMITED BUDGETS, WHICH MEANS THAT WE CANNOT SELF-INSURE; BECAUSE WE DON'T HAVE FLEXIBILITY IN THE REVENUE SOURCES THAT LARGER CITIES HAVE; AND BECAUSE SO MANY OF OUR LOCAL OFFICIALS ARE PART-TIME AND VOLUNTEERS, WE ARE MORE VULNERABLE TO HAVING THEM RESIGN FROM OFFICE. IN OTHER WORDS, WE CAN'T AFFORD THE CURRENT SITUATION - WE CAN'T AFFORD THE ALTERNATIVES -- AND WE CAN'T AFFORD TO LOSE OUR LEADERSHIP.

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WE HOPE THAT YOU WILL WORK WITH US AS WE STRUGGLE WITH THIS NATIONAL PROBLEM WHICH IS BECOMING MORE SERIOUS EVERY DAY AS CHANGES IN THE INSURANCE MARKETPLACE ARE PUTTING OUR MEMBERS MORE AND MORE AT RISK.

THE PARTICULAR CASE MOST OFTEN SINGLED OUT AS INFLUENCING THE CHANGES IN OUR CURRENT INSURANCE MARKETPLACE OCCURRED IN JACKSON TOWNSHIP, NEW JERSEY, IN 1983: A CASE WHICH HAS REVERBERATED CLEAR ACROSS THE UNITED STATES AND AS FAR AS LLOYDS OF LONDON. IT WAS IN JACKSON THAT 97 RESIDENTS CLAIMED THAT THEIR DRINKING WATER HAD BEEN CONTAMINATED BY CHEMICALS LEAKING FROM A LANDFILL WHICH HAD BEEN CLOSED YEARS EARLIER BY THE FEDERAL ENVIRONMENTAL PROTECTION AGENCY.

THE CITIZENS WERE SUCCESSFUL IN THEIR LITIGATION, AND A JURY AWARDED THEM 15.8 MILLION DOLLARS -- LATER REDUCED TO 5.8 MILLION ON APPEAL. COMPANIES INSURING THE TOWNSHIP WERE FORCED TO PAY THE FULL AWARD DESPITE THE FACT THAT THE POLICY THEY HAD ISSUED AMOUNTED TO ONLY ONE MILLION DOLLARS.

AS A RESULT OF THE JACKSON TOWNSHIP CASE, ONE INSURANCE COMPANY IN PENNSYLVANIA CANCELLED THREE HUNDRED MUNICIPAL POLICIES IN THAT STATE ALONE. AND I WOULD LIKE TO POINT OUT, MR. CHAIRMAN, THAT OFTEN WE ARE FINDING POLICIES COMPLETELY CANCELLED WHETHER OR NOT THE MUNICIPALITY HAS EVER FILED A CLAIM.

OF COURSE THE JACKSON TOWNSHIP CASE IS NOT AN ISOLATED INSTANCE. EVERY DAY, TOWNS AND TOWNSHIPS ARE BECOMING FRUSTRATED AND FRIGHTENED BY THE ENORMITY OF THE CRISIS. OUR RESOURCES ARE BEING STRETCHED TO THE LIMIT AND IN MANY CASES -- ESPECIALLY WITH THE IMPLICATIONS OF GRAMM-RUDMAN-HOLLINGS AND THE REAL THREAT TO GENERAL REVENUE SHARING ALL COMING DOWN AT ONE TIME -- OUR VERY SURVIVAL AS AN ADEQUATELY FUNCTIONING UNIT OF GOVERNMENT IS IN QUESTION.

IN AN EFFORT TO COME TO GRIPS WITH THESE ISSUES, THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS DIRECTED AN INVESTIGATION INTO THE POSSIBILITIES FOR FEDERAL INVOLVEMENT IN RESOLVING THE SITUATION. AS A RESULT, ON JANUARY 14, 1986, WE CONVENED AND FACILITATED THE FIRST MEETING OF REPRESENTATIVES OF LOCAL, STATE AND FEDERAL GOVERNMENT, THE INSURANCE INDUSTRY AND OTHER PRIVATE SECTOR INTERESTS. PARTICIPANTS IN OUR DAY-LONG "LIABILITY SUMMIT" INCLUDED REPRESENTATIVES FROM:

WHITE HOUSE OFFICE OF INTERGOVERNMENTAL AFFAIRS

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

HOUSE SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM

OFFICE OF SENATOR PAUL SIMON

OFFICE OF CONGRESSMAN JOHN PORTER

U.S. DEPARTMENT OF JUSTICE

U.S. ENVIRONMENTAL PROTECTION AGENCY

CITY OF VIRGINIA BEACH, VIRGINIA

U.S. CONFERENCE OF MAYORS

NATIONAL ASSOCIATION OF COUNTIES

NATIONAL LEAGUE OF CITIES

NATIONAL CONFERENCE OF STATE LEGISLATURES

CONNECTICUT COUNCIL OF SMALL TOWNS

PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS

MARYLAND INSURANCE DIVISION

AMERICAN INSURANCE ASSOCIATION

PUBLIC RISK AND INSURANCE MANAGEMENT ASSOCIATION
NATIONAL INSURANCE CONSUMERS ORGANIZATION
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION
NATIONAL SHERIFFS ASSOCIATION
CRUM & FORSTER INSURANCE COMPANIES
GARDNER, MOSS AND HOPPER, ATTORNEYS-AT-LAW
ARNOLD AND PORTER, ATTORNEYS-AT-LAW
RISK SCIENCE INTERNATIONAL
RISK INSURANCE MANAGEMENT SOCIETY

THE THIRTY-FIVE PARTICIPANTS AT THE SUMMIT EXAMINED THE AVAILABILITY AND AFFORDABILITY OF INSURANCE, THE VULNERABILITY OF LOCAL GOVERNMENTS TO LAWSUITS UNDER FEDERAL ENVIRONMENTAL AND CIVIL RIGHTS STATUTES, AND POSSIBILITIES FOR FEDERAL ACTION TO SOLVE THE PROBLEMS.

WE FOCUSED ON SECTION 1983 OF THE CIVIL RIGHTS ACT OF 1871 AND ON FEDERAL ENVIRONMENTAL STATUTES, THE SOURCES OF MOST REQUIREMENTS, LITIGATION AND JUDGMENTS INVOLVING THE FEDERAL GOVERNMENT. THESE ARE AREAS WHERE REMEDIAL ACTION BY STATE GOVERNMENTS IS NOT THE ANSWER, SINCE IF THERE IS A CAUSE OF ACTION AGAINST US IN EITHER SECTION 1983 OR THE ENVIRONMENTAL AREA, THE PLAINTIFFS CAN SUE IN FEDERAL COURT -- THEREBY OBVIATING DEALING WITH THE STATE COURTS. IN ESSENCE, WHATEVER THE STATES ARE DOING TO RESOLVE THE CRISIS -- AND MANY ARE VERY ACTIVE -- IT IS IMMATERIAL IN THOSE TWO AREAS, AND WE MUST LOOK TO THE FEDERAL GOVERNMENT FOR POSSIBLE SOLUTIONS.

THE ORIGINAL BASIS FOR SECTION 1983 WAS AS A HUMAN RIGHTS STATUTE RIGHT AFTER THE CIVIL WAR, WHICH ENABLED THE FEDERAL GOVERNMENT TO STEP IN UNDER THE 14TH AMENDMENT WHERE STATE LAWS WEREN'T BEING ENFORCED. IN THE FIRST HUNDRED YEARS OF THIS LAW THERE WERE APPROXIMATELY 200 SUITS FILED -- BUT IN THE LAST YEAR, UNDER THIS LAW, THERE WERE

TWENTY-FOUR THOUSAND SUITS FILED, NOT INCLUDING SUITS FILED BY PRISON INMATES AGAINST THE STATE FOR ALLEGED CIVIL RIGHTS VIOLATIONS. MANY OF THESE TWENTY-FOUR THOUSAND LAW SUITS HAVE NOTHING WHATEVER TO DO WITH TRADITIONAL HUMAN RIGHTS. IF YOU DON'T LIKE, FOR INSTANCE, A LOCAL ZONING DECISION, SUITS HAVE BEEN ALLOWED UNDER SECTION 1983 ALLEGING THAT YOUR CIVIL RIGHTS HAVE BEEN INFRINGED. THIS INTERPRETATION OF SECTION 198 HAS CAUSED A REAL EXPLOSION IN LITIGATION, PARTICULARLY SINCE THERE ARE NO CAPS ON EITHER ATTORNEYS FEES OR AWARDS IN THE FEDERAL COURT SYSTEM UNDER THIS STATUTE. ONE EXAMPLE, BROUGHT OUT AT THE SUMMIT, WAS A CASE WHERE A MUNICIPAL EMPLOYEE SUED FOR BACK PAY AND WAS AWARDED THE BACK PAY OF $1,500 -- WHICH WAS WHAT HE WANTED -- BUT THERE WERE $400,000 IN ATTORNEYS FEES.

THIS BRINGS US TO OUR FIRST RECOMMENDATION, MR. CHAIRMAN. WE FEEL VERY STRONGLY THAT IT IS IMPORTANT TO RESEARCH WHETHER THERE IS A CHANCE FOR A SURGICAL LEGISLATIVE REMEDY TO AMEND, IN A VERY NARROW FASHION, SECTION 1983 SO AS TO ABSOLUTELY AND COMPLETELY RETAIN THE CIVIL RIGHTS THRUST OF THE ORIGINAL LAW BUT REMOVE SOME OF THE NON-HUMAN RIGHTS CHALLENGES THAT ARE NOW FILED UNDER THE SECTION.

OF COURSE THERE IS A DANGER IN THIS THAT SUCH AN ACTION MIGHT BE CONSIDERED AN ASSAULT ON THE CIVIL RIGHTS LAWS OF THE UNITED STATES, AND THAT SHOULD NOT BE THE INTERPRETATION. WE STRONGLY SUPPORT RETENTION OF THE ENTIRE CIVIL RIGHTS THRUST OF SECTION 1983. IT IS POSSIBLE, HOWEVER, THAT LANGUAGE IN THE ORIGINAL STATUTE WAS NOT AS PRECISE AS IT MIGHT BE TODAY WHEN WE HAVE A MUCH BROADER HISTORICAL BASE IN CIVIL RIGHTS STATUTES.

WE HAVE STRONG CONCERN, MR. CHAIRMAN, ABOUT WHAT IS HAPPENING UNDER SECTION 1983. IT STRIKES US AS PART OF A CONTINUING ASSAULT ON THE STATUS OF LOCAL GOVERNMENTS AS PARTNERS IN THE FEDERAL SYSTEM. SPECIFICALLY, AN INCREASING ATTEMPT, THROUGH

LEGISLATIVE AND JUDICIAL INTERPRETATION TO TREAT LOCAL GOVERNMENTS AS THOUGH THEY WERE SO
SORT OF BUSINESS. IT PRESUMES THAT LOCALITIES CAN RAISE THEIR PRICES TO DEAL WITH THE
JUDGMENT -- PRICES, IN THIS CASE, BEING LOCAL TAXES -- AND THAT'S NOT ALWAYS THE
CASE, BECAUSE OF MANY REQUIREMENTS AND CEILINGS OF STATE LAW. OR THAT THEY CAN
WITHDRAW THEIR SERVICES, LIKE A BUSINESS COULD DO -- WHICH THEY ALSO CANNOT DO,
BECAUSE THEIR SERVICE LEVELS ARE MANDATED BY STATE LAW; OR THAT THEY CAN GO BANKRUPT,
WHICH THEY CANNOT DO.

WE FACE ESSENTIALLY THE SAME PROBLEMS IN THE POLLUTION ARENA. IN HAVING TO SCRAMBLE
FOR ANY KIND OF INSURANCE PROTECTION THEY CAN FIND, MANY TOWNS AND TOWNSHIPS HAVE
TO SETTLE FOR LIMITS ON COVERAGE -- HIGHER DEDUCTIBLES, LOWER PROTECTION LEVELS,
AND EXCLUSIONS OF CERTAIN EXPOSURES, MOST OFTEN POLLUTION EXPOSURES.

THIS EXCLUSION OF POLLUTION COVERAGE IS OF PARTICULAR CONCERN TO THOSE MUNICIPALITIES
WITH LANDFILLS. THE ENORMITY OF THE IMPENDING FINANCIAL DANGER BECOMES APPARENT WHEN
YOU CONSIDER THE TREMENDOUS NUMBER OF OPERATIONAL AND PREVIOUSLY FUNCTIONING
LANDFILLS ACROSS THE COUNTRY. FEDERAL MANDATES HAVE FORCED US TO ACCEPT THIS
LIABILITY IN PERPETUITY AND HAVE LEFT US NO TOOLS TO DEFEND OURSELVES: NO RESOURCES
TO FALL BACK ON EXCEPT OUR SEVERELY STRAINED PROPERTY TAX BASE.

WE DO HAVE SEVERAL OTHER SUGGESTIONS THAT THE COMMITTEE MIGHT WANT TO CONSIDER, MR. CHAIRM
THE FEDERAL GOVERNMENT MIGHT PROVIDE INDEMNIFICATION IN THE WAY E.P.A. ALREADY DOES
FOR ITS CONTRACTORS AT WASTE SITES. THEIR CONTRACTORS ARE INDEMNIFIED, BUT LOCAL
GOVERNMENTS ARE NOT; AND INSURANCE COMPANIES HAVE INDICATED THEY CANNOT SEE A SITUATION
WHERE THEY WILL REENTER THE ENVIRONMENTAL MARKET, BECAUSE EVEN SANITARY LANDFILLS POTENTIA
ARE HAZARDOUS WASTE SITES -- SINCE HOUSEHOLD GARBAGE CONTAINS ALL SORTS OF TOXIC
MATERIALS.

ANOTHER OPTION WE EXPLORED -- AND SOMETHING WE FEEL IS CRUCIAL TO THOSE OF US WHO ARE TRYING OUR BEST TO DO A GOOD JOB UNDER THESE EXTREMELY DIFFICULT CIRCUMSTANCES -- IS TO ESTABLISH FEDERAL STANDARDS OF COMPLIANCE IN THE ENVIRONMENTAL AREA, SO THAT A LOCAL GOVERNMENT WILL KNOW THAT IF IT DOES EVERYTHING THE STANDARDS REQUIRE IT WILL HAVE COMPLETE, OR AT LEAST LIMITED, PROTECTION. WITHOUT SUCH STANDARDS, NO MATTER WHAT WE DO -- NO MATTER HOW MUCH MONEY WE SPEND -- NO MATTER WHICH HIGH-PRICED CONSULTANTS WE ENGAGE OR HIGH-TECHNOLOGY EQUIPMENT WE PURCHASE -- NOTHING WILL REDUCE OUR LIABILITY UNDER THE ENVIRONMENTAL LAWS.

THE PRESSING, IMMEDIATE NEED FROM THE PERSPECTIVE OF THE NATION'S TOWNS AND TOWNSHIPS IS FOR CONSIDERATION OF FEDERAL INTERVENTION THAT WILL SOLVE THE LIABILITY PROBLEM AT LEAST FOR THE SHORT TERM, BRIDGING THE GAP WHICH EXISTS BETWEEN OUR PRESENT EXPOSURE AND OUR ABILITY TO PAY ENORMOUSLY INFLATED INSURANCE PREMIUMS. WE ALSO NEED CRISIS INTERVENTION BEFORE LOCALITIES ARE FORCED TO "GO BARE."

AS YOU KNOW, MR. CHAIRMAN, PRECEDENT EXISTS IN FEDERAL LAW FOR THE GOVERNMENT TO ACT AS INSURER OF LAST RESORT; WE FEEL STRONGLY THAT THAT OPTION DESERVES ANOTHER LOOK. AN OPPORTUNITY EXISTS NOW TO LEARN FROM THE MISTAKES OF THE FLOOD AND RIOT PROGRAMS OFFERED THROUGH H.U.D. AND THE CROP INSURANCE PROGRAMS OFFERED THROUGH U.S.D.A., AND TO DEVELOP DETAILS OF A PROPOSAL WHICH WOULD BE AN EFFECTIVE TOOL IN THIS ARENA. CLEARLY, PARTICULARLY UNDER THE PRESENT ECONOMIC SITUATION, SUCH AN INITIATIVE WOULD HAVE TO BE AS SELF-SUPPORTING AS POSSIBLE.

THERE ARE ALSO SOME SUGGESTIONS COMING FROM THE STATE LEVEL WHICH THE COMMITTEE MIGHT FIND VALUABLE. COMMON ELEMENTS APPEAR IN SEVERAL PROPOSALS OF WHICH WE ARE AWARE; THESE PARTICULAR EXAMPLES COME FROM THE EXPERIENCE OF THE STATES OF PENNSYLVANIA, OHIO AN MICHIGAN. IN MICHIGAN, THERE ARE BILLS CURRENTLY PENDING BEFORE THE LEGISLATURE, AND OHIO HAS RECENTLY ENACTED REMEDIAL LEGISLATION. THEY ALL CONTAIN OR ARE CONSIDERING PROPOSALS TO:

-- ABOLISH OR AMEND THE DOCTRINE OF JOINT AND SEVERAL LIABILITY FOR GOVERNMENTAL UNITS;

-- EXEMPT GOVERNMENTAL OFFICERS OR EMPLOYEES FROM LIABILITY WHILE ENGAGED IN THE PERFORMANCE OF THEIR DUTIES;

-- MODIFY THE COLLATERAL SOURCE RULE i.e., A PROCEDURE BY WHICH THE COURT REDUCES THE JUDGMENT BY AN AMOUNT EQUAL TO PAYMENTS RECEIVED FROM GOVERNMENTA BENEFITS, NO-FAULT INSURANCE AND OTHER SOURCES;

-- CAP DAMAGES AWARDED FOR PAIN AND SUFFERING;

-- PROVIDE FOR RECOVERY BY THE PREVAILING PARTY OF COSTS AND REASONABLE ATTORNEYS FEES, IF THE COURT FINDS THE ACTION TO HAVE BEEN FRIVOLOUS OR SOLELY FOR HARASSMENT.

ALSO UNDER CONSIDERATION CURRENTLY -- IN THE STATE OF MICHIGAN -- IS THE PRINCIPLE OF PROPORTIONAL LIABILITY: DETERMINATION OF A RELATIVE DEGREE OF FAULT BETWEEN ALL PARTIES THROUGH A FORMULA APPLIED BY THE COURT. IN THIS CASE, ALTHOUGH A LOCAL UNIT WOULD ALWAYS BE RESPONSIBLE FOR ITS PERCENTAGE OF FAULT, IT WOULD BE PROTECTED FROM THOSE WHO CONSIDER LOCAL GOVERNMENTS TO HAVE THE PROVERBIAL -- AND MYTHICAL -- "DEEP POCKETS," AND THEREFORE FAIR GAME AND TEMPTING TARGETS.

IN CLOSING, MR. CHAIRMAN, LET ME THANK YOU AGAIN FOR THE OPPORTUNITY TO TESTIFY THIS MORNING. WE ARE ALL IN THIS SITUATION TOGETHER AND ITS RESOLUTION IS OF VITAL CONCERN TO US ALL. CERTAINLY THERE IS AMPLE OPPORTUNITY FOR FURTHER EXPLORATION AND INVOLVEMENT AT THE FEDERAL LEVEL, AND THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS WOULD LIKE TO WORK WITH YOU, YOUR STAFF AND MEMBERS OF THE COMMITTEE TO DEVELOP DETAILS OF A PROPOSAL WHI WILL BE AN EFFECTIVE RESPONSE TO THIS NATIONAL CRISIS.

CHAPTER 345

VEHICLES — CIVIL AND CRIMINAL LIABILITY

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GENERAL PROVISIONS

345.01 Words and phrases defined. Words and phrases defined in s. 340.01 are used in the same sense in this chapter unless a different definition is specifically provided.

CIVIL LIABILITY

345.05 Municipal liability for motor vehicle accidents. (1) In this section the following terms have the designated meanings:

(a) "Business" means any business whether governmental or proprietary.

(b) "Governing body" means the county board with reference to counties, the town board with reference to towns, the legislative body of a city or village with reference to cities and villages and the board of any district, center or other municipality with reference to other municipalities enumerated in par. (c).

(c) "Municipality" means any county, city, village, town, school district (as enumerated in s. 67.01 (5)), sewer district, drainage district and, without restriction because of failure of enumeration, any other political subdivision of the state.

(2) A person suffering any damage proximately resulting from the negligent operation of a motor vehicle owned and operated by a municipality, which damage was occasioned by the operation of the motor vehicle in the course of its business, may file a claim for damages against the municipality concerned and the governing body thereof may allow, compromise, settle and pay the claim. In this subsection, a motor vehicle is deemed owned and operated by a municipality if the vehicle is either being rented or leased, or is being purchased under a contract whereby the municipality will acquire title.

(3) A claim under this section shall be filed in the manner, form and place specified in s. 893.80. The limitations under s. 893.80 (3) are not applicable to a claim under this section.

(4) In this section, judgments against municipalities shall be certified, filed and collected as provided in s. 66.09 whether named therein or not.

(5) If the allowance of claim is by or the judgment is against any municipality lying in more than one town, city, village or county, the governing body of the debtor municipality shall prorate the amount of the claim allowed or the judgment and so certify to the proper officials for tax levy, so that the taxable property of the

debtor municipality will equitably bear the amount of the claim or judgment.

History: 1975 c. 200; 1977 c. 285; 1979 c. 32 s. 92 (5); 1979 c. 221, 323, 355; 1983 a. 189 ss. 252, 329 (7), (31); 1983 a. 192.

Statute is applicable when the injury can be traced to incidents of vehicle operation on the highway rather than any collateral use such as loading. Rabe v. Outagamie County, 72 W (2d) 492, 241 NW (2d) 428.

See note to 340.01, citing Lemon v. Federal Ins. Co. 107 W (2d) 351, 320 NW (2d) 33 (Ct. App. 1982), aff'd 111 W (2d) 563, 331 NW (2d) 379 (1983).

This section did not apply to injury caused by negligent supervision of bus passengers. Hamed v. Milwaukee County, 108 W (2d) 257, 321 NW (2d) 199 (1982).

345.06 Owner's liability for act of operator. The owners of every vehicle operating upon any highway for the conveyance of passengers for hire are jointly and severally liable to the party injured for all injuries and damage done by any person in the employment of such owners as an operator, while operating such vehicle, whether the act occasioning such injuries or damage was intentional, negligent or otherwise, in the same manner as such operator would be liable.

345.07 Civil actions by secretary. In addition to all existing remedies afforded by civil and criminal law, the secretary is authorized to bring civil actions for the recovery of all fees, taxes, interest and penalties to which the state may be entitled by reason of the operation by any person of a motor vehicle upon the highways of this state.

History: 1977 c. 29 s. 1654 (7) (c).

345.08 Suit to recover protested tax or fee. No suit shall be maintained in any court to restrain or delay the collection or payment of the taxes levied or the fees imposed or enacted in chs. 341 to 349. The aggrieved taxpayer shall pay the tax or fee as and when due and, if paid under protest, may at any time within 90 days from the date of such payment sue the state in an action at law to recover the tax or fee so paid. If it is finally determined that such tax or fee or any part thereof was wrongfully collected for any reason, the department of administration shall issue a warrant on the state treasurer for the amount of such tax or fee so adjudged to have been wrongfully collected and the state treasurer shall pay the same out of the transportation fund. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as were made within the 90-day period preceding the commencement of the action. Such suits shall be commenced as provided in s. 775.01.

History: 1977 c. 29 s. 1654 (1); 1979 c. 32 s. 92 (5).

345.09 Service of process on nonresident. (1) The use and operation of a motor vehicle over the highways of this state by a nonresident is deemed an irrevocable appointment by such nonresident of the secretary to be the true and lawful attorney upon whom may be served all legal processes in any action or proceeding against the nonresident or the nonresident's executor, administrator or personal representative, growing out of the use or operation of the motor vehicle in this state and resulting in damage or loss to person or property, whether the damage or loss occurs on a highway or on abutting public or private property. Such appointment is binding upon the nonresident's executor, administrator or personal representative. Such use or operation of a motor vehicle by such nonresident is a signification of the nonresident's agreement that any such process or notice against such nonresident or the nonresident's executor, administrator or personal representative which is so served shall be of the same legal force and validity as if served on them personally.

(2) The secretary as attorney upon whom processes and notices may be served under this section shall, upon being served with such process or notice, forthwith mail by registered mail a copy thereof to such nonresident at the out-of-state nonresident address given in the papers so served. It is the duty of the party or the party's attorney to certify in the papers so served that the address given therein is the last-known out-of-state nonresident address of the party to be served. In all cases of service under this section there shall be served 2 authenticated copies for the secretary and such additional number of authenticated copies as there are defendants so served in the action. One of the secretary's copies shall be retained for the secretary's record of service and the other copy shall be returned with proper certificate of service attached for filing in court as proof of service of the copies by having mailed them by registered mail to the defendants named therein. The service fee shall be $4 for each defendant so served. The secretary shall keep a record of all such processes and notices, which record shall show the day and hour of service.

(3) This section applies to a nonresident defendant who was a resident of this state at the time of the accident or occurrence which gave rise to the cause of action sued on.

History: 1977 c. 29 ss. 1467, 1654 (7) (c); 1977 c. 60, 418.

See note to 801.05, citing Chilcote v. Sherburn, 372 F Supp. 86.

ARRESTS, BAIL, PENALTIES

345.11 Uniform traffic citation and complaint. (1) On and after July 1, 1969, the uniform traffic citation created by this section shall

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SUBCHAPTER VIII

CLAIMS AGAINST GOVERNMENTAL BODIES, OFFICERS AND EMPLOYES

893.80 Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits. (1) No action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company; corporation, subdivision or agency or to the defendant officer, official, agent or employe; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

(2) The claimant may accept payment of a portion of the claim without waiving the right to recover the balance. No interest may be recovered on any portion of a claim after an order is drawn and made available to the claimant. If in an action the claimant recovers a greater sum than was allowed, the claimant shall recover costs, otherwise the defendant shall recover costs.

(3) The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employes for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $50,000, except that the amount recoverable shall not exceed $25,000 in any such action against a volunteer fire company organized under ch. 213 or its officers, officials, agents or employes. If the volunteer fire company is part of a combined fire department, the $25,000 limit still applies to actions against the volunteer fire company or its officers, officials, agents or employes. No punitive damages may be allowed or recoverable in any such action under this subsection.

(4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

(5) Except as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employe thereof for acts done in an official capacity or the course of his or her agency or employment. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

(6) A 1st class city, its officers, officials, agents or employes shall not be liable for any claim for damages to person or property arising out of any act or omission in providing or failing to provide police services upon the interstate freeway system or in or upon any grounds, building or other improvement owned by a

county and designated for stadium or airport purposes and appurtenant uses.

History: Sup. Ct. Order, 67 W (2d) 784; 1975 c. 218, 1977 c. 285, 447; 1979 c. 34; 1979 c. 323 s. 29, 1981 c. 63.

Judicial Council Committee's Note, 1979: Previous s. 895.43 is renumbered for more logical placement in restructured ch. 893. [Bill 326-A]

A husband's action for loss of consortium is separate, has its own $25,000 limitation and is not to be reduced by his wife's negligence. Schwartz v. Milwaukee, 54 W (2d) 286, 195 NW (2d) 480.

Sub. (3) [(4)] establishes municipal immunity against actions for intentional torts of its employes, and assault and battery constitutes an intentional tort. Sub. (3) [(4)] also precludes suit against municipality for alleged failure of police and fire commission to act in removing officer, since this is a quasi-judicial function. Salerno v. Racine, 62 W (2d) 243, 214 NW (2d) 446.

Where the policy contained no language precluding the insurer from raising the limited liability defense, the $25,000 limitation was not waived. Sambs v. Brookfield, 66 W (2d) 296, 224 NW (2d) 582.

Plaintiff's complaint alleging that 2 police officers who forcibly entered his home and physically abused him were negligent inter alia in failing to identify themselves and in using excessive force, in reality alleged causes of action in trespass and assault and battery—intentional torts for which the municipality was immune from direct action under (3) [(4)], hence, the trial court should have granted defendant's demurrer to the complaint. Baranowski v. Milwaukee, 70 W (2d) 684, 235 NW (2d) 279.

Compliance with statute is a condition in fact requisite to liability, but is not a condition required for stating a cause of action. Rabe v. Outagamie County, 72 W (2d) 492, 241 NW (2d) 428.

Any duty owed by a municipality to the general public is also owed to individual members of the public. Inspection of buildings for safety and fire prevention purposes under 101.14 does not involve a quasi-judicial function within meaning of 895.43 (3) [(4)]. Coffey v. Milwaukee, 74 W (2d) 526, 247 NW (2d) 132.

Under (1), plaintiff has burden of proving the giving of notice, or actual notice and nonexistence of prejudice, but need not allege same in complaint. City is required to plead lack of compliance with statute as defense. See note to 81.15, citing Weiss v. Milwaukee, 79 W (2d) 213, 255 NW (2d) 496.

Doctrine of municipal tort immunity applied to relieve political subdivisions from liability for negligence where automobile collision occurred due to use of sewer by truck. Allstate Ins. v. Metro. Sewerage Comm. 80 W (2d) 10, 258 NW (2d) 148.

Park manager of state owned recreational area who knew that publicly used trail was inches away from 90-foot gorge and that terrain was dangerous, is liable for injuries to plaintiffs who fell into gorge, for breach of ministerial duty in failing to either place warning signs or advise superiors of condition. Cords v. Anderson, 80 W (2d) 525, 259 NW (2d) 672.

Breach of ministerial duty was inferred by complaint's allegations that defendant state employes, who set up detour route on which plaintiff was injured, failed to follow national traffic standards, place appropriate signs, and safely construct temporary road. Pavlik v. Kinsey, 81 W (2d) 42, 259 NW (2d) 709.

Insurance policy was construed to waive recovery limitations under 81.15 and 895.43, 1971 stats. Stanhope v. Brown County, 90 W (2d) 823, 280 NW (2d) 711 (1979).

See note to 11.31, citing Kurtz v. City of Waukesha, 91 W (2d) 103, 280 NW (2d) 757 (1979).

"Quasi-judicial" or "quasi-legislative" acts are synonymous with "discretionary" acts. Scarpaci v. Milwaukee County, 96 W (2d) 663, 292 NW (2d) 816 (1980).

Recovery limitations under 81.15 and 895.43 (2), 1965 stats., are constitutional. Sambs v. City of Brookfield, 97 W (2d) 356, 293 NW (2d) 504 (1980).

City was liable for negligent acts of employes even though employes were immune from liability. Maynard v. City of Madison, 101 W (2d) 273, 304 NW (2d) 163 (Ct. App. 1981).

This section cannot limit damage award under 42 USC 1983. Court erred in reducing attorney's fees award. Thompson v. Village of Hales Corners, 115 W (2d) 289, 340 NW (2d) 704 (1983).

Plaintiff's failure to itemize claim as required by (1) (b) deprived court of subject matter jurisdiction, city's failure to plead noncompliance with (1) (b) did not waive this defense. Figgs v. City of Milwaukee, 116 W (2d) 281, 342 NW (2d) 254 (Ct. App. 1983).

Sheriff's dispatcher breached ministerial duty by failing to have fallen tree removed from road. Domino v. Walworth County, 118 W (2d) 488, 347 NW (2d) 917 (Ct. App. 1984).

See note to 74.78, citing 68 Atty. Gen. 389.

Monroe v. Pape, 367 US 167 (1961) is overruled insofar as it holds that local governments are wholly immune from suit under 42 USC 1983. Monell v. New York City Dept. of Social Services, 436 US 658 (1978).

Defendant public official has burden to plead "good faith" as affirmative defense in s. 1983 case. Gomez v. Toledo, 446 US 635 (1980).

See note to art. VII, sec. 3, citing Supreme Court of VA. v. Consumers Union, 446 US 719 (1980).

Municipality is immune from punitive damages under s. 1983. Newport v. Fact Concerts, Inc. 453 US 247 (1981).

City ordinance regulating cable television was not exempt from antitrust scrutiny under Parker doctrine. Community Communications Co. v. Boulder, 455 US 40 (1982).

State may not be sued by citizen under wrongful death statute. Pinon v. State of Wisconsin, 368 F Supp. 608.

Civil rights actions against municipalities discussed. Starstead v. City of Superior, 533 F Supp. 1365 (1982).

The discretionary function exception to government tort liability. 61 MLR 163.

Several police supervisor immunities from state court suit may be doomed. Fine, 1977 WBB 9.

Municipal liability: The failure to provide adequate police protection — the special duty doctrine should be discarded. 1984 WLR 499.

893.82 Claims against state employes; notice of claim; limitation of damages. (1) (a) The purposes of this section are to:

1. Provide the attorney general with adequate time to investigate claims which might result in judgments to be paid by the state.

2. Provide the attorney general with an opportunity to effect a compromise without a civil action or civil proceeding.

3. Place a limit on the amounts recoverable in civil actions or civil proceedings against any state officer, employe or agent.

(b) The provisions of this section shall be liberally construed to effectuate this intent.

(2) In this section:

(a) "Civil action or civil proceeding" includes a civil action or civil proceeding commenced or continued by counterclaim, cross claim or 3rd-party complaint.

(b) "Claimant" means the person or entity sustaining the damage or injury or his or her agent, attorney or personal representative.

(c) "Damage" or "injury" means any damage or injury of any nature which is caused or allegedly caused by the event. "Damage" or "injury" includes, but is not limited to, any physical or mental damage or injury or financial damage or injury resulting from claims for contribution or indemnification.

(3) No civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the

action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved. A specific denial by the attorney general is not a condition precedent to bringing the civil action or civil proceeding.

(4) (a) Except as provided in par. (b), if the civil action or proceeding under sub. (3) is based on contribution or indemnification, the event under sub. (3) is the underlying cause of action, not the cause of action for contribution or indemnification, and the 120-day limitation applies to that event.

(b) 1. If the claimant under par. (a) establishes that he or she had no actual or constructive knowledge of the underlying cause of action at the time of the event under sub. (3), the 120-day limitation under sub. (3) applies to the earlier of the following:

a. The date the cause of action for contribution or indemnification accrues.

b. The date the claimant acquired actual or constructive knowledge of the underlying cause of action.

2. The claimant has the burden of proving he or she had no actual knowledge of the underlying cause of action under this paragraph.

(5) The notice under sub. (3) shall be sworn to by the claimant and shall be served upon the attorney general at his or her office in the capitol by certified mail. Notice shall be considered to be given upon mailing for the purpose of computing the time of giving notice.

(6) The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employe or agent, including any such action or proceeding based on contribution or indemnification, shall not exceed $250,000. No punitive damages may be allowed or recoverable in any such action.

History: 1973 c. 333; 1977 c. 29; 1979 c. 221; 1979 c. 323 s. 30; 1979 c. 355; 1983 a. 27.

Judicial Council Committee's Note, 1979: This section is previous s. 895.45 renumbered for more logical placement in restructured ch. 893. The previous 90-day time period in which to file written notice of a claim against an employe of the state of Wisconsin has been increased to 120 days to make the time period consistent with the period for filing notice of claims with other governmental bodies allowed in s. 893.80. (See note following s. 893.80). [Bill 326-A]

Court had no jurisdiction over state employes alleged to have intentionally damaged plaintiff where complaint failed to comply with notice of claim statute. Elm Park Iowa, Inc. v. Dennision, 92 W. (2d) 723, 286 NW (2d) 5 (Ct. App. 1979).

Notice provisions of this section do not apply to third-party complaints for contribution. Coulson v. Larsen, 94 W. (2d) 56, 287 NW (2d) 754 (1980).

Non-compliance with notice of injury statute aborts claimant's rights against employe. This section does not deny equal protection or due process to non-complying claimants. Yotvat v. Roth, 95 W. (2d) 357, 290 NW (2d) 524 (Ct. App. 1980).

Non-compliance with notice of injury statute barred suit even though defendant failed to raise issue in responsive pleading. Mannino v. Davenport, 99 W. (2d) 602, 299 NW (2d) 823 (1981).

Plaintiff was required to serve notice on attorney general as condition precedent to bringing claim. Doe v. Ellis, 103 W. (2d) 581, 309 NW (2d) 375 (Ct. App. 1981).

Court properly granted defendant's motion to dismiss since notice of claim of injury was not served upon attorney general within 120 day limit. Ibrahim v. Samore, 118 W. (2d) 720, 348 NW (2d) 554 (1984).

SUBCHAPTER IX

STATUTES OF LIMITATION; ACTIONS BY THE STATE, STATUTORY LIABILITY AND MISCELLANEOUS ACTIONS

893.85 Action concerning old-age assistance lien. (1) An action to collect an old-age assistance lien filed under s. 49.26, 1971 stats., prior to August 5, 1973, must be commenced within 10 years after the date of filing of the required certificate under s. 49.26 (4), 1971 stats.

(2) No claim under s. 49.25, 1971 stats., may be presented more than 10 years after the date of the most recent old-age assistance payment covered by the claim.

History: 1977 c. 385; 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is previous s. 893.181 renumbered for more logical placement in restructured ch. 893. [Bill 326-A]

893.86 Action concerning recovery of legal fees paid for indigents. An action under s. 757.66 to recover an amount paid by a county for legal representation of an indigent defendant shall be commenced within 10 years after the filing of the claim required under s. 757.66 or be barred.

History: 1979 c. 323.

893.87 General limitation of action in favor of the state. Any action in favor of the state, if no other limitation is prescribed in this chapter, shall be commenced within 10 years after the cause of action accrues or be barred. No cause of action in favor of the state for relief on the ground of fraud shall be deemed to have accrued until discovery on the part of the state of the facts constituting the fraud.

History: 1979 c. 323.

Judicial Council Committee's Note, 1979: This section is previous s. 893.18 (6) renumbered for more logical placement in restructured ch. 893. [Bill 326-A]

See note to 893.43, citing State v. Holland Plastics Co. 111 W. (2d) 497, 331 NW (2d) 320 (1983).

893.88 Paternity actions. Notwithstanding s. 990.06, an action for the establishment of the paternity of a child shall be commenced within

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ing in any court of record in this state, in connection with which bond or undertaking real property is offered as security.

(2) Before any such bond or undertaking shall be approved, there shall be attached thereto and made a part of such bond or undertaking a statement under oath in duplicate by the surety that he is the sole owner of the property offered by him as security and containing the following additional information:

(a) The full name and address of the surety.

(b) That he is a resident of this state.

(c) An accurate description by lot and block number, if part of a recorded plat, or by metes and bounds of the real estate offered as security.

(d) A statement that none of the properties offered constitute the homestead of the surety.

(e) A statement of the total amount of the liens, unpaid taxes and other encumbrances against each property offered.

(f) A statement as to the assessed value of each property offered, its market value and the value of the equity over and above all encumbrances, liens and unpaid taxes.

(g) That the equity of the real property is equal to twice the penalty of the bond or undertaking.

(3) This sworn statement shall be in addition to and notwithstanding other affidavits or statements of justification required or provided for elsewhere in the statutes in connection with such bonds and undertakings.

Cross Reference: This section does not apply to bonds of personal representatives. See 856.25.

895.346 Bail, deposit in lieu of bond. When any bond or undertaking is authorized in any civil or criminal action or proceeding, the would-be obligor may, in lieu thereof and with like legal effect, deposit with the proper court or officer cash or certified bank checks or U.S. bonds or bank certificates of deposit in an amount at least equal to the required security; and the receiver thereof shall give a receipt therefor and shall notify the payor bank of any deposits of bank certificates of deposit. Section 808.07 shall govern the procedure so far as applicable.

History: Sup. Ct. Order, 67 W (2d) 784, 1977 c. 187 s. 135.

895.35 Expenses in actions against municipal and other officers. Whenever in any city, town, village, school district, vocational, technical and adult education district or county charges of any kind are filed or an action is brought against any officer thereof in his official capacity, or to subject any such officer, whether or not he is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action is discontinued or dismissed or such matter is determined favorably to such officer, or such officer is reinstated, or in case such officer, without fault on his part, is subjected to a personal liability as aforesaid, such city, town, village, school district, vocational, technical and adult education district or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it appears from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.

History: 1971 c. 154.

County has option to refuse payment of sheriff's criminal defense attorney's fees. Babitsch & Babitsch v. Lincoln County, 82 W (2d) 574, 263 NW (2d) 218.

A city may reimburse a commissioner of the city redevelopment authority for his legal expenses incurred where charges are filed against him in his official capacity seeking his removal from office for cause and such charges are found by the common council to be unsupported. Such reimbursement is discretionary. The city redevelopment authority lacks statutory authority to authorize reimbursement for such legal expenses. 63 Atty. Gen. 421.

A city council can, in limited circumstances, reimburse a council member for reasonable attorneys' fees incurred in defending an alleged violation of the open meeting law, but cannot reimburse the member for any forfeiture imposed. 66 Atty. Gen. 226.

This section applies to criminal charges brought against former officer for alleged fraudulent filing of expense vouchers. 71 Atty. Gen. 4.

895.36 Process against officer. No process against private property shall issue in an action or upon a judgment against a public corporation or an officer in his official capacity, when the liability, if any, is that of the corporation nor shall any person be liable as garnishee of such public corporation.

895.37 Abrogation of defenses. (1) In any action to recover damages for a personal injury sustained within this state by an employe while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

(a) That the employe either expressly or impliedly assumed the risk of the hazard complained of.

(b) When such employer has at the time of the injury in a common employment 3 or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

(c) When such employer has at the time of the injury in a common employment 3 or more

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895.44 Exemption from civil liability for furnishing safety inspection or advisory services. The furnishing of, or failure to furnish, safety inspection or advisory services intended to reduce the likelihood of injury, death or loss shall not subject the insurer, its agent or employe undertaking to perform such services as an incident to insurance, to liability for damages from injury, death or loss occurring as a result of any act or omission in the course of such services. This section shall not apply if the active negligence of the insurer, its agent or employe created the condition which was the proximate cause of injury, death or loss, nor shall it apply to such services when required to be performed under the provisions of a written service contract.

895.46 State and political subdivisions thereof to pay judgments taken against officers. (1) (a) If the defendant in any action or special proceeding is a public officer or employe and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employe and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employe in excess of any insurance applicable to the officer or employe shall be paid by the state or political subdivision of which the defendant is an officer or employe. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employe, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employe did not act within the scope of employment. If the employing state agency or the attorney general denies that the state officer, employe or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employe to give notice to his or her department head of an action or special proceeding commenced against the defendant officer or employe as soon as reasonably possible is a bar to recovery by the officer or employe from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employe legal counsel and the offer is refused by the defendant officer or employe. If the officer, employe or agent of the state refuses to cooperate in the defense of the litigation, the officer, employe or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

(b) Persons holding the office of county sheriff on March 1, 1983, are covered by this subsection. This subsection covers other county sheriffs who have:

1. Satisfactorily completed or are currently enrolled in the preparatory program of law enforcement training under s. 165.85 (4) (b) 1, or have provided evidence of equivalent law enforcement training and experience as determined by the law enforcement standards board; or

2. At least 5 years of full-time employment as a law enforcement officer, as defined in s. 165.85 (2) (c).

(c) This subsection does not apply to any action or special proceeding brought by a county against its county sheriff if the action or proceeding is determined in favor of the county.

(d) On and after March 1, 1983, all persons employed as deputy sheriffs, as defined in s. 40.02 (48) (b) 3, are covered by this subsection. The county board shall adopt written policies for payments under this subsection on behalf of any other person, provided that person has satisfied the minimum standards of the law enforcement standards board, who serves at the discretion of the sheriff as a law enforcement officer as defined in s. 165.85 (2) (c), and the county may make the payments upon approval by the county board.

(2) Any town officer held personally liable for reimbursement of any public funds paid out in good faith pursuant to the directions of electors at any annual or special town meeting shall be reimbursed by the town for the amount of the judgment for damages and costs entered against the town officer.

(3) The protection afforded by this section shall apply to any state officer, employe or agent while operating a state-owned vehicle for personal use in accordance with s. 20.916 (7).

History: 1973 c. 333; Sup. Ct. Order, 67 W (2d) 761; 1975 c. 81, 198, 199; 1977 c. 29; 1979 c. 74, 221; 1981 c. 20, 1981 c. 96 s. 67; 1981 c. 314 s. 136; 1983 a. 6; 1983 a. 27 s. 2202 (32).

Cross Reference: See 775.06 for special procedure applying to state law enforcement officers.

NOTE: Subs. (1) (b) and (c) were repealed and recreated and (d) was created by 1983 Wis. Act 6, relating to payment of judgments against sheriffs and deputy sheriffs. The act contains notes explaining the changes.

Highway commission supervisors who were responsible for the placement of highway warning signs may be sued if a sign is not placed in accordance with commission rules. They cannot claim the state's immunity from suit. Chart v. Dvorak, 57 W (2d) 92, 203 NW (2d) 673.

"Litigation" under (1) refers only to civil proceedings. Sheriffs are not "public officers" under (1). Babitch & Babitch v. Lincoln County, 82 W (2d) 574, 263 NW (2d) 218.

Policy behind (1) discussed. Thuermer v. Village of Mishicot, 86 W (2d) 374, 272 NW (2d) 409 (Ct. App. 1978).

Public employes' insurer had no right of recovery under 270.58 (1), 1969 stats. Horace Mann Ins. Co. v. Wauwatosa Bd. of Ed. 88 W (2d) 385, 276 NW (2d) 761 (1979).

State could not be sued as indemnitor under 270.58 (1) (now 895.46 (1)). Fiala v. Voight, 93 W (2d) 337, 286 NW (2d) 824 (1980).

See note to 29.68, citing Wirth v. Ehly, 93 W (2d) 433, 287 NW (2d) 140 (1980).

State may not be sued directly for tortious acts of its employes. Miller v. Smith, 100 W (2d) 609, 302 NW (2d) 468 (1981).

"Color of law" element of s. 1983 lawsuit is not identical to "scope of employment" element under (1). Cameron v. Milwaukee, 102 W (2d) 448, 307 NW (2d) 164 (1981).

Question of whether aldermen were acting within scope of employment was inappropriately decided by summary judgment. Schroeder v. Schoessow, 108 W (2d) 49, 321 NW (2d) 131 (1982).

Once governmental unit decides to provide counsel, it must provide complete and full representation on all issues. Beane v. City of Sturgeon Bay, 112 W (2d) 609, 334 NW (2d) 235 (1983).

Sub. (1) does not prevent a state official from asserting "good faith" as a defense to a charge of infringement of civil rights. Clarke v. Cady, 358 F Supp. 1156.

Purpose of this section is not to transform any suit against state employe into suit against state, but to shield state employes from monetary loss in tort suits. Ware v. Percy, 468 F Supp. 1266 (1979).

County could not be held liable for civil rights judgment against county judge where judgment found that judge was not carrying out duties of office at relevant time. Harris v. County of Racine, 512 F Supp. 1273 (1981).

895.47 Indemnification of the Wisconsin state agencies building corporation and the Wisconsin state public building corporation. If the Wisconsin state agencies building corporation or the Wisconsin state public building corporation is the defendant in an action or special proceeding in its capacity as owner of facilities occupied by any department or agents of any department of state government, the judgment as to damages and costs shall be paid by the state from the appropriation made under s. 20.865 (1) (fm). The state, when it does not provide legal counsel to the defendant, its members, officers or employes, shall pay reasonable attorney fees and costs of defending the action regardless of the results of the litigation, unless the court or jury finds that the member, officer or employe did not act within the scope of that person's employment. Failure by the defendant to give notice to the department of justice of an action or special proceeding commenced against it, its members, officers or employes as soon as reasonably possible shall bar recovery by the defendant, its members, officers or employes from the state under this section. Attorney fees and expenses may not be recovered if the state offers the member, officer or employe legal counsel and the offer is refused.

History: 1977 c. 344, 447.

895.48 Civil liability exemption; emergency care. Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care. This immunity does not extend when employes trained in health care or health care professionals render emergency care for compensation and within the scope of their usual and customary employment or practice at a hospital or other institution equipped with hospital facilities, at the scene of any emergency or accident, enroute to a hospital or other institution equipped with hospital facilities or at a physician's office.

History: 1977 c. 164.

"Good Samaritan" law discussed. 67 Atty. Gen. 218.

The Good Samaritan statute. 62 MLR 469 (1979).

895.49 Certain agreements to limit or eliminate tort liability void. (1) Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.

(2) This section does not apply to any insurance contract or worker's compensation plan.

(3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.

History: 1977 c. 441, 447.

895.50 Right of privacy. (1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:

(a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;

(b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and

(c) A reasonable amount for attorney fees.

(2) In this section, "invasion of privacy" means any of the following:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

(c) Publicity given to a matter concerning the private life of another, of a kind highly offensive

* * * * *

The Liability Insurance Crisis in the Wisconsin Petroleum Marketer Industry:

Oil Jobbers of Wisconsin, Inc. is an association representing nearly 500 petroleum product wholesalers and retailers and their suppliers in the State of Wisconsin.

Members average 5 employees, are family owned businesses and serve the farms, small towns and cities with the whole range of petroleum products including motor fuels, kerosene, home heating oil, diesel fuels, aviation fuel and a variety of accessory products such as batteries, tires and other automotive products. The Association also represents the convenience store industry of the State.

Currently there is only one company providing liability insurance and pollution insurance to the marketers of this State. While some coverage is available through brokers, it is questionable in content and is not freely available to all members with varying degrees of exposure. Generally, the greater exposure through diversification means a severely restricted availability of insurance or considerably higher premiums. Diversification being the primary ingredient for survival in this industry a marketer is frequently faced with a choice between diversification and survival or insurance.

Some of the suppliers to our industry find it extremely difficult to obtain insurance at all. Transporters of product (the eighteen wheel tank transports) and companies which install underground tanks have little choice in insurance carrier and none at all in terms of exorbitant premiums.

Enclosed for your information are the results of a recently conducted survey of our members. These responses are testimony in themselves. Please feel free to use this information as you may see fit.

Sincerely,

Raymond G. Karnes, CAE
Executive Vice President

RGK/lal
encls.

OIL JOBBERS OF WI INSURANCE SURVEY:

	High	Low	Avg.	Med.	Response
1984 General liability amount:	$10,000,000	$100,000	$1,009,000	$500,000	(59)
Umbrella Policy:	10,000,000	300,000	2,523,000	$2,000,000	(57)
Cost of Liability:	60,000	656	10,061	6,000	(49)
Cost of Pollution:	95,000	350	5,637	1,260	(32)

Was pollution included in above coverage: Yes 45 No 9

Separate Pollution Policy, same carrier: Yes 9 No 20

Same coverage available in 1985? Liability: Yes 43 No 16

Pollution: Yes 40 No 15

Did your costs go up (85 vs. 84): Yes 58 No 2

What percent increase:	800%	5%		55%	(50)

Will they continue to provide liability coverage you need: Yes 45 No 3

Pollution coverage you need: Yes 37 No 10

Has your carrier projected a premium increase for 1986: Yes 33 No 15

What percent increase:	187%	5%		30%	(22)

Will your carrier insist on claims made policy: Yes 11 No 16

Will you find pollution coverage if it is removed from present policy: Yes 17 No 22

Do you handle gasoline: 50 Home Heating Oil: 51 LP Gas: 6 Alcohol Blends: 2

Do you operate a Terminal: 2 Bulk Plant: 49 Retail Stations: 33 Convenience Stores: 22

Tank Testing Program in effect: Yes 12 No 40

Regular Inventory: Yes 50 No -

Many members had increased premiums with reduced coverage.

Examples: 84 premium $7,200 for 10,000,000 umbrella.
85 premium $27,500 for 3,000,000 umbrella.

84 premium $4,500 for 7,000,000 umbrella.
85 premium $24,000 for 5,000,000 umbrella.

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Mar. 31, 1986

Senator Robert Kasten
United States Senate
Washington, DC 20510

Re: Liability Insurance

Dear Senator Kasten,

I understand the hearing you have scheduled on liability insurance April 7th already has an abundance of scheduled constituents to testify. Since everyone cannot testify personally, please accept the following information on insurance problems my firm has experienced as my testimony.

I just received renewal rates for our liability coverage which I feel will be of interest; they are:

	1985	1986	Increase
1) Liability and Contents	5381	11,173	108%
2) One Million Umbrella	1200	2,500	110%
3) Auto	1750	2645	50%
4) Building Insurance	1518	2898	90%

Please note that I had no claims filed against me last year except one. That was where I was sued on a product I never sold; manufactured by a brand I never sold. It cost me, my supplier, and both our insurance companies over $5000.00 to convince the judge that we had nothing to do with the product.

Again, I implore you to 1) Limit contingent fees, 2) Limit awards to reasonable compensation, 3) Exempt dealers who do not modify a product from liability, 4) Limit the percent of liability to no more than the percent of negligants.

If my third suggestion were adopted I never would have been brought into the suit I described. If you have any questions please call me.

Sincerely,

Bert

Bert C. Gagnon
PRESIDENT

BCG:cp

WILMOT, WISCONSIN 53192 ■ TELEPHONE 414-862-2301

Wilmot Mountain
INCORPORATED

April 14, 1986

Senator Bob Kasten
Attention: Steve Loucks
Room #110
Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Loucks:

Since we are unable to attend your public hearing in Eau Claire today, we wish to record in writing our concern over rising liability premiums in our industry. As the cost of skiing continues to rise as a result of these premium increases, the sport becomes less accessible to the consumer.

If ski areas are to resist reducing the quality of skiing and equipment maintenance, they must increase revenue. Therefore, the lift ticket becomes even more difficult to justify in family budgets.

Wisconsin is an important Ski State partly because skiing is a component of Wisconsin's critical recreational industry.

Since skiing is an inherently risky activity, personal injury is an intrinsic part of the sport. Yet, ski area operators are subjected to lawsuit regardless of the actions of the skier.

In the particular case of Wilmot Mountain, we are experiencing rate increases despite an excellent safety record. We have been inspected thoroughly over the years and have received extremely high grades. We have not lost in court the few times we have been there. We have been active in writing both State and National Standards for uphill lift devices.

Our premium increases threaten our viability as a business despite almost 50 years of existence. They therefore threaten our 450 seasonal jobs and 30 year round careers. With the ripple effect to area suppliers, the significance on Kenosha County of this threat is substantial.

We recognize the cyclical nature of insurance premium changes and believe the current increases are due to high nation-wide loss ratios from adverse judgements in court for businesses of all kinds. We feel the solution to this is Tort Reform.

Our unique judicial system requires at least two changes. 1) A cap on pain and suffering (i.e. $100,000) 2) Abandonment of the current plaintiff attorney's contingency system.

Naturally these kinds of profound changes are squarely in the hands of our Legislators.

With the time constraints involved, we will limit our comments to the foregoing. These are, therefore, only a partial review of our problem.

Sincerely,

WILMOT MOUNTAIN, INC.

Michael J. Reese
President

MJR/dn

4/14

— Yours L.
Kay Letts
7

AMERICAN

April 7, 1986

Senator Robert Kasten
110 Hart
Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Kasten,

We read with a great deal of pleasure the introduction of a bill by you directed to the liability insurance crisis. It would be appreciated if your office would provide me with the details of the impact of this bill on us and our liability insurance.

Sometime ago I wrote you outlining the fact that American Archery had opened it's doors at Florence, WI. We are one of the oldest archery companies in the country and our location at Florence, WI has proved very successful. Our rate of growth has been excellent and we presently employ close to thirty people in our plant at Florence, WI. We hope that with increase sales we'll be able to employ up to fifty people in the very near future.

We hope to sell in the neighborhood of approximately 1.5 million dollars this year. Approximately 10% of our sales have been in the foreign market and we expect that to grow dramatically. We presently market throughout the United States.

It is my understanding that the archery industry from an insurance standpoint has been reclassified as a sporting goods industry. Consequently our liability insurance has been an excessive cost factor in producing bows. At the first of this year our insurance carrier notifyed us that they would no longer carry our liability insurance. We are presently in the process of scrambling for liability insurance coverage and it now appears to us that we are looking at approximately $50,000.00 in costs for half the coverage we have carried in the past.

Obviously we had no alternative but to except this coverage at these excessive costs. You should also recognize that we have never had a liability claim in our company. Further I would like to point out that less than one-half of one percent of our gross revenue is ear marked for warranty repairs. We believe our bow line is of such quality that we guarantee our product for the life of the owner. Unfortunately the quality of the product does not seem to impress the insurance writer.

AMERICAN ARCHERY ▲ AMERICAN ARCHERY LANE, P.O. BOX 200 ▲ FLORENCE, WI 54121 ▲ 715/528-3000

American Archery products sold by Fabian Archery Inc.

AMERICAN ARCHERY

AMERICAN

April 7, 1986

Senator Robert Kasten
Page 2

We will continue to follow your bill and your activites with a good deal of interest. Thank you for the fine assistance you have provided for the business community in the past.

Yours very truly,

K. L. Laird

K. L. Laird President

KLL: jml

AMERICAN ARCHERY ▲ AMERICAN ARCHERY LANE, P.O. BOX 200 ▲ FLORENCE, WI 54121 ▲ 715/528-3000

American Archery products sold by Falcon Archery Inc.

Safeway Sling Company
of Milwaukee, Inc.
Web Sling Manufacturers
4606 S. PACKARD AVE
CUDAHY, WI 53110
414 - 744-5728

4-3-86

Dear Senator Kasten,

My firm has manufactured a quality product for six years. During those six years we have not been involved in one accident or had one claim against us. We consistently produce a safe product and are extremely quality conscious.

A few days ago, I was notified that regardless of our unblemished safety and quality record, my company's product liability insurance is not being renewed. Since credibility is everything in my line of business and insurance is part of that credibility, I need insurance. If I can't get coverage at a fair rate in the next two months Safeway will be forced out of business.

The marketplace will be less competitive and my loyal customers will lose a responsible, reliable supplier.

The most significant problem is that nine people will be out of work. These are the "victims" that no one writes or hears about. We have not been negligent in any way yet, our livelihoods are being threatened for no just cause.

Most certainly we are being wronged.

Product liability reform is very long overdue. The greed that permeates the bottom line of this issue needs to be curbed promptly.

What can we do to work together to resolve this serious problem?

Sincerely,

Susan Szymczak
President

April 1st, 1986

My name is Andrea Szymczak. I am the 12 year old daughter of Mr. and Mrs. Szymczak of Safeway Sling Co. Milwaukee. Our company was told that its product liability insurance was not being renewed.

My mom began the business in 1980, with the help of my dad. They were very excited, and proud. So was I. I would join them at the business every summer, doing sweeping, and cleaning. I even learned to oil the machines, and thread them too! After about 2 years of working over time, taking 20 minute lunches, and working weekends, my mom hired the first employee. She was a lady who was very happy to get a job.

I know the road to success has been a long, and hard one. Since that first employee my mom has hired 6 more people

Everyone at Safeway is given a fair chance to work and learn. I, too, had the same chance.

Now, Safeway has been in business for 6

years. They haven't made one faulty product, nor have had <u>any</u> accidents. I'm afraid of what will happen to our family if we can't get insurance.

Who can help us?

Andrea Szymanski

TO whom it may concern:

I am an employee of Safeway Sling Co., of Milwaukee, Inc. a small company that is growing larger and that is becoming very successful. When I started I was unemployed and still in highschool with no real experience. But the people at Safeway gave me an opportunity. Not knowing a lot about business, Safeway is teaching me more than any other big corporation could. They are caring people and care about the people who make them grow.

For six years they have had no accidents and no major complaints against them. While other companies just throw their material together and try to cheat people. That in turn causes accidents and people getting turned down for insurance.

I don't think a company like Safeway which has a clean record should be denied insurance. We all put a lot of time and effort into the company to make it work. The product put out by Safeway is done with caution and care. Many new companies start out, but never finish. Many people want new businesses but can't because of many reasons especially insurance. Big corporations get insurance just like that, but how about a chance for a small business. We all need a chance especially the small company's. How do you think these

big company's got to be big. they gave them a chance to get there. well, how about giving an honest business an honest chance at trying to grow bigger.

Many people are losing their jobs day by day. Tell me, why would you want to close a business that is doing good and let more people out of work? Why put people out of work when you don't have to. We are a very dependable and a safe company. We would never want to sell a bad product to anyone. By not getting insurance, that would mean more than you think. It would mean putting a family out of business, employees out of a job and more people in the unemployment line which no one needs. Our consumers would have a less opportunity to find a quality product at a competitive price. Please try to help us.

Sincerely an employee of Safeway Sling Co., of Milwaukee, Wisc.

Lisa Fabry

Wisconsin Northern
TRANSPORTATION CO., INC.

Washington Heights - Vernon St
Eau Claire, Wisconsin 54701
Phone: (715) 834-1463

BUSES FOR
NATIONWIDE CHARTERS
& SPECIAL TOURS

April 27, 1986

U.S. Senator Robert Kasten
110 Hart Building
U.S. Senate
Washington, D.C. 20510

Dear Senator Kasten:

I recently attended your hearing in Eau Claire on the current liability insurance crisis. Instead of just filling out the form you distributed, I would like to take this opportunity to tell you in a bit more detail the experiences of our small family owned business.

Wisconsin Northern Transportation Co., Inc. has been in business for over 60 years, and owned by this family for over 25 years. We supply motorcoach charter transportation and a regular route service between Eau Claire, Wisconsin and Duluth, Minnesota.

To make this as clear and easy to read as I can, I have divided the occurances into time periods. This will indicate the long time span and intense frustration we are experiencing. The liability insurance crisis is just another, albeit large, crucial issue we must deal with in addition to normal operations. At which point will one more crisis be the one to break the back of small business?

Schedule of Events Preceeding Liability Insurance Crisis

1 - 1982 The owner of 100% of the family owned business, the Father, dies.

2 - 1983 The family owes Federal Inheritance taxes at a rate of 37%, over $200,000. The family is not allowed to use any of the numerous Corporation Tax Credits against this bill.

Cont. Page 2

3 - 1984 Corporation insurance rate rises 100% from 1983 to 1984, for 13 motorcoaches, a rise from $25,000 to $46,000.

4 - 1985 November 19, 1985 laws are changed to require $5 Million dollars in liability insurance for a motorcoach to operate.

5 - 1985 December 20, 1985, Transit Casualty Insurance Company goes bankrupt.

6 - Wisconsin Northern Transportation Co., Inc. has 12 days to secure liability insurance or our ICC permits will be pulled and we will no be allowed to operate.

At this point we find ourselves joining hundreds of other motorcoach companies also insured with Transit Casualty, in attempting to secure proper coverage. We did, at an increase of over 200% in premiums. Out of five insurance agents and all their contracts, only one company, National Indemnity would quote the first million dollars, and only one company, Lexington Insurance, would quote the excess of $4 Million. It was a take it or leave it situation. Without it, we could not operate at all. With it, we are victims of the price structure the Insurance Company establishes.

Schedule of Events After Obtaining Coverage

1 - 1986 Month one downpayment of $45,000. Month one, monthly payment of $12,500. Months 2 to 7 payments per month of $12,500. Wisconsin Northern Transportation financed this at 12%. During insurance negotiations Wisconsin Northern Transportation had no insurance coverage on property and for month one had to hire a 24 hour guard.

2 - Liability insurance was secured on a bus by bus basis, one at a time. First only four units were insured and they could not cross the state line. Our scheduled Eau Claire, Superior, Duluth run had to stop in Superior and cabs were hired to transport people over to Duluth, MN.

3 - Insurance was rated for distance traveled per unit incorrectly and company refuses to respond to repeated written and verbal requests for correction.

4 - Insurance Company will not respond to repeated requests to inform us of savings by raising deductibles even higher.

5 - Insurance Company sent a terse notation for four people we had employed who can not drive anymore. Requests to discuss why or what we can do to reinstate these people have not been responded to. We assume it is related to their driving record and want to discuss this. Two people were dismissed immediately. One of those, a driver with nine years experience, was dismissed because we are a transportation company and if he can not drive we can not employ him. Two others are delegated, temporarily,

Cont. Page 3

to other assignments. If we can not get a response from the insurance company, they will be dismissed also.

6 - Insurance company has informed us that we can not hire anyone for motorcoach driving without two years prior experience in motorcoaches. Insurance company does not consider whether driving records are clear and accident free. Nor does the insurance company consider school bus or semi driving experience as under the two year requirement.

Cost of Insurance Per Sale

Our current coverage for 1986 costs $140,000 for 13 motorcoaches and one car. In our charter and tour division that requires us to sell over 200 trips at our average price of $717.00, or two complete months worth of charters. In our regular run, serving the public from Eau Claire, WI to Duluth, MN, it would require us to sell over 20,000 tickets at our average price of $6.96, or twice the number we sell now per year.

Loss Record

Copies enclosed of last three years. One accident in November 1985 does not appear. We are not clear on the amount of claim, as insurance coverage was eliminated when company went bankrupt in December 1985. Repairs to bus are $23,000 and we have hired a lawyer to see if Transit Casualty Insurance Receivership will reinburse.

In 1985 we paid 100% more for coverage than 1984, but since our premiums were paid and the company went bankrupt, we effectively prepaid $46,000 for no coverage.

Trade Association

Copies of letters attached. Synopsis - Much expression of concern and no action taken.

We are aware of your concern and appreciate your actions on behalf of small businesses in Wisconsin. If we can add any details I may have omitted, please feel free to contact us.

Sincerely,

R Zank

Rebecca Zank

Enclosures

BZ/jk

SAFETY PRODUCTS

3202 Latham Drive
P.O. Box 4190
Madison, Wisconsin 53711
Telephone 608-271-3300

Personal Safety Equipment
Protective Clothing
First Aid Supplies

April 17, 1986

U.S. Senator Bob Kasten
110 Hart Building
U.S. Senate
Washington, D.C.

Dear Bob:

As the owner and operator of a small family business in Madison, we have become aware of the crisis in the insurance industry and I felt that it was important that I write to you to cast my vote for some type of reasonably intelligent help that our government can offer in this escalating problem that seemingly affects most all businesses as well as professional men and women.

We just recently have been advised by our insurance carrier that the amount of liability available to our company will be decreased by 93-1/3% for 1986 and in the face of that, there will be an increase of premium at around 114%.

Our company's history has been excellent over the 40 years that we have been in business as to any liability litigation or problems with the manner in which we conduct our business.

We are primarily a distributor of personal safety products to industry and for all of the years that we have offered our product line, we have been extremely cautious and careful about the quality of the manufacturers we represent as well as our own staff and their training in dealing with customers and presenting the proper safety product for use in our customer's factories and businesses.

Please take a moment to let me hear from you on what is being done and, more importantly, what concrete measures you anticipate that are likely to help small businessmen remain in business as they face the crossroads of knowing that they must have liability insurance and it is approaching a question of affordability.

Sincerely yours,

Marv Conney

dw
P.S. We met at Stan Mintz's house recently and hope to see you again soon.

RUSSELL S. GONNERING, M.D., S.C.
Mayfair North Tower
2600 North Mayfair Road, Suite 950
Milwaukee, Wisconsin 53226
(414) 257-0170

Ophthalmic Plastic and Reconstructive Surgery
Diseases and Surgery of the Orbit

April 2, 1986

The Honorable Robert Kasten
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dear Senator Kasten:

I am writing to you to strongly support a national attempt at liability reform, and to give you a concrete example from your home state to tell you why.

For the past two years, I have been one of many co-investigators across the country exploring the use of a new drug, botulinum-A toxin, to treat various forms of blepharospasm. This disease is a chronic condition of unknown cause, which creates functional blindness because of severe and uncontrolled spasm of facial and eyelid muscles. Although radical surgery had been used to treat individuals with this problem, the surgery was expensive, wasn't always successful and had a high rate of complications.

The use of this new drug, injected every 3-4 months in a five-minute procedure as an outpatient, has proven to be extremely effective, safe, and inexpensive. The FDA is nearing final decision on its release for general use. Unfortunately, it is no longer available. Its production and distribution has been suspended because of the lack of afforable liability insurance.

Fifty people in Wisconsin, Michigan and Illinois are now asking me why they must go back to the former misery and life of seclusion they had before the toxin, and I don't have good answers for them. Although trial lawyers state they will not represent claimants without unlimited fee potential, is this really in the best interests of society?

The media recently reported on an award of in excess of one million dollars for loss of "psychic powers" following a CT scan. Why should even one patient go back to a life of functional blindness to insure the right to bring such a suit and win compensation?

Sincerely,

Russell S. Gonnering, M.D.,FACS
RSG/sbg

cc: My patients

April 26 · 1986

The Honorable Robert Kasten
517 East Wisconsin Ave
Milwaukee, Wisconsin 53202

Dear Senator Kasten

I am writing on behalf of my sister Mrs Ellen Wiskowski who has a functional blindness and has been treated with a new drug, Betaferon-A

This drug is no longer available to her because of the lack of affordable liability insurance

Please on my sisters behalf I strongly urge you to support a Federal attempt at liability reform and help my sister and the many people in your home State who badly need this drug.

Leonard J Szukszuk

571-W17468 PLEASANT VIEW
MUSKEGO, WISCONSIN
53150

April 16, 1986

The Honorable Senator Proxmire
517 E. Wisconsin Ave
Milwaukee, Wis 53202

Dear Senator Proxmire:

I am a Blepharospasm patient of Dr. Russell T. Tawney. I had been unable to keep my eyes open without holding one of them open with my fingers while trying to do my work. Needless to say you can understand that it is almost impossible to do anything that way.

I had 2 series of injections of the Botulinum A - Lopin, and was able to walk with eyes open and had hope to drive again and to be able to be self sufficient.

Now the Lopin is unable to be manufactured due to the high liability insurance, and

I, and other Blepharoptosis
victims are again "Insidiously
Blind."

Another thing I strongly object
to is the fact that Medicare classes
the injections as "Cosmetic surgery"
If only one Senator, or any one
person on the Medicare staff
who make the rules had this
disabling muscle problem, they
soon would reclassify this as
a Medical problem which it is.
It is Not Cosmetic.

I am enclosing a copy of
Dr. Konneringe's letter. Please
again take note of the case
he's sighted in Green. I don't believe
in so-called "psychic powers"
and strongly object to money being
given out so freely in such a case
while Blepharoptosis victims must
go back to a life of Misery.

I hope that you will

take a firm stand to support a national attempt at liability reform, as not only the patients from diseases such as thousands of others can once again be able to get the calcium - D topic & be able to hold our eyes open & be able to function by ourselves also to try to change this claim Medicare has that the injections are "cosmetic surgery".

Thank you,

Mrs. Gloria Budnik
S. 76 W. 14806 Hubert
Muskego, Wis. 53150

422-0128

Eleanore M. Donovan
3502 So. 61st Street
Milwaukee, Wi.
53220

April 28, 1986

The Honorable Robert Kasten
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dear Senator Kasten:

My husband reminds me how busy you are however I feel that you have enough integrity to read my appeal and extend you needed and worthwhile help. As a mother and grandmother I am always concerned about any malady that might affect any of my loved ones.

I have a very dear cousin named Mrs. Alice Wiskowske who has been suffering for many years with a form of the disease called blepharospasm. Alice has gone to many, many doctors including the Mayo Clinic.

This desease is a chronic condition of unknown cause. It creates functional blindness because of severe and uncontrolled

spasms of facial and eyelid muscles. Doctors told Alice that radical surgery had been used as a treatment for this problem but the surgery was very expensive, it wasn't always successful and had a high rate of complications. This reaction bothered Alice. Undaunted she continued her search. As they say Hope Springs Eternal. She found a doctor who for the past two(2) years has been one of many co-investigators throughout exploring the use of a new drug, botulinum (BOTULINUM) - A toxin to treat various forms of blepharospasm.

Using this new drug, toxin can be injected every 3-4 months in a five minute procedure as an outpatient. This toxin has proven to be extremely effective, safe and inexpensive. Did I say Hope springs eternal - I was wrong. This toxin, unfortunately is no longer available. Both its production and distribution has been suspended because

kindness so that a suit and such compensation can be evolved

Alice and I and our families implore you to use your good efforts to get this wonderful toy in back into production and distribution.

Incidentely if I have read your comments correctly lately this problem - liability is right "down your alley" in that you feel product liability can impede progress.

Thanks for your help.

Mrs. Eleanore M. Donovan

of the lack of affordable liability insurance. The FDA is nearing a final decision on its release for general use.

Besides Alice many people in Wisconsin and the Midwest states, not to mention other throughout the country will have to go back to their former misery and a life of seclusion they had prior to the receipt of injections of this type. The doctor advises Alice that many trial lawyers advise that they will not represent claimants without unlimited fee potential. I do not ~~feel~~ think this is in the best interests of Alice and your other constituents who are so inflicted.

In discussions on the subject of liability we have heard that recent suit for an individuals following a CT scan resulted in an award of one million dollars. Is this the reason the lawyers have become so skittish? It does not seem fair that anyone should go back to functional

CONSUMER RIGHTS DRIVE

THE DANGEROUS DOZEN

A SURVEY OF MAJOR PRODUCT LIABILITY LAWSUITS

MAY 1986

WISCONSIN ACTION COALITION

MILWAUKEE 610 N. Water St. — #210, Milwaukee, WI 53202 (414)-277-2562 MADISON 125 W. Doty Ave. — #3, Madison, WI 53703 (608)-256-1250
GREEN BAY 130 E. Walnut St. — #201, Green Bay, WI 54301 (414)-435-1866

OVERVIEW

Lawsuits and damage awards act as a deterrent to corporations to market dangerous products and expose workers to dangerous conditions. Along with state and federal regulations, lawsuits better insure that products and equipment are fully tested for safety and accurately labeled before they are sold to consumers or used in work places. Compensatory and punitive damage awards take the profit out of cutting corners on testing, designing, manufacturing, using and selling unsafe products. Proposed changes aimed at reducing or eliminating compensatory and punitive damage awards would correspondingly reduce incentives to corporations to produce safe products and maintain safe work conditions.

COMPENSATORY DAMAGE AWARDS

Compensatory damage awards compensate victims for losses caused by their injuries. These losses include both economic and non-economic. Economic losses are those which can be statistically calculated, principally lost wages as a result of the injury. Non-economic losses are not easily calculated and include such things as the trauma of the loss of a spouse or child on the surviving family, living with a permanent illness, or living the rest of ones life disfigured or unable to fully participate in society. Its impossible to place a statistical dollar amount on these items, the costs however are real to those affected. Non-economic losses therefore are left to the judgement of juries.

Proposals to place arbitrary caps on compensatory awards or eliminate non-economic loss awards would be exceeding unfair to victims. The result would be victims not fully compensated for their injuries.

Elimination of non-economic awards would result in seniors, housewives and in many cases children who are not wage earners, receiving little or no compensation for their injuries. Elimination of non-economic awards would also increase the number of lawsuits ending up in court since insurance companies would not have to worry about a large non-economic loss verdict being issued by a jury.

PUNITIVE DAMAGE AWARDS

Punitive damages are aimed at punishing manufacturers for knowingly producing unsafe products*. Punitive damages awards are aimed at:

Punishing companies for knowingly selling unsafe products;

Providing strong disincentives for companies to produce or continue producing unsafe products;

Provide incentive for victims to file suits thereby helping to enforce the law.

Punitive damage settlements are rare in product liability cases. In order to obtain punitive damages a victim must demonstrate that a manufacturer has shown "reckless disregard" or "flagrant misconduct". This would include:

Knowingly producing an unsafe vehicle such as Ford did with the Pinto;

Failing to notify the public and withdraw dangerous products from the market place such as A.H. Robbins did with the Dalcon Shield;

Knowingly exposing workers to dangerous substances such as Johns-Manville did with asbestos.

In each of these cases compensatory and punitive damages were awarded.

---

* Punitive Damages in Mass Tort Litigation - Froud v. Celotex Corp. DEPAUL LAW REVIEW, Ann Gillespie Pietrick, Vol. 32 Winter 1983, pp. 464, 465.

A DOZEN DANGEROUS PRODUCTS

This report looks at a dozen dangerous products which have been redesigned or removed from the the market or workplace as a result of lawsuits (a number of which are summarized in the following pages). In each case the product has killed or severely injured innocent victims.

In cases where punitive damages have been awarded it was found that manufacturers knowingly marketed or exposed workers to dangerous products.

Ford Pinto - Grimshaw v. Ford Motor Company
$3.5 million punitive damage award.
The car was subsequently redesigned.

Asbestos - Fisher V. Johns Mansville and Bell Asbestos Mines Ltd.
$300,000 punitive damage award.
Asbestos has now been removed from products and workplaces.

Dalkon Shield - Palmer v. A.H. Robins Co.
$6.2 million punitive damage award
The Dalkon Shield has been removed from the market place.

Flammable Baby Cloths - Gryc v. Dayton Hudson Co.
$1 million punitive award
Flannelette removed from the market place

Gas Tanks - Stambaugh v. International Harvester
$650,000 punitive damage award
Tractor gas cap redesigned

Drano - Moore v. Jewel Tea Co.
$10,000 punitive damage award
Product package redesigned to prevent explosion

In cases where compensatory damages have been awarded products have been redesigned or removed from the market and workplace.

Dioxin - Piatt v. Independent Petrochemical Co.
$2.68 million compensatory award
Dioxin removed from market place and handled under strict safeguards

Agent Orange - Ryan et.al. v. Dow Chemical et.al.
$180 million settlement agreement
Dioxin removed from herbicides

DES - Bichler v. Eli Lilly
$500,000 compensatory award
Stricter testing of drugs prior marketing

Infant Formula - Brown v. Syntex Labratories
$145,000 compensatory award
Unsafe formula removed from market

Liquid Plumber - Carr v. Clorox Co.
$1.5 million compensatory award
Cap replaced with one that is childproof

Rely Tampons - Kelm v. Procter and Gamble
$300,000 compensatory award
Tampon withdrawn from the market

SUMMARY OF CASES

PINTO CASE

Grimshaw v. Ford Motor Company Calif Court of Appeal, No 20095. May 29, 1981

A woman was killed and a child severely burned when the Ford Pinto they were driving exploded into flames when struck from behind by another car. Ford was aware of the defective Pinto gas tank but decided to sell the car without design changes to save money. The gas tank could have been made safer at a cost of only $10.00 per car. The victims were awarded $3 million compensatory damages and $3.5 million punitive.

The following are excerpts from the Pinto decision

A 1972 For Pinto Hatchback automobile unexpectedly stalled on a freeway, erupting into flames when it was rear ended by a car proceeding in the same direction. The driver of the Pinto, suffered fatal burns and a 13-year-old passenger in the Pinto, suffered severe and permanently disfiguring burns on his face and entire body. Ford Motor Company and others were sued. Following a six month jury trial, verdicts were returned in favor of plaintiffs

against Ford Motor Company. The passenger was awarded $2,516,000 compensatory damages and $125 million punitive damages; The heirs of the driver were awarded $559,680 in compensatory damages. On Fords motion for a new trial punitive damage award was reduced to $3.5 million.

Ford Testing Revealed Pinto Design Flaws

Crash tests conducted by Ford revealed problems with the Pinto gas tank. Pinto prototypes struck from the rear with a moving barrier at 21 miles per hour caused the fuel tank to be driven forward and to be punctured, causing fuel leakage in excess of proposed federal standards. A production Pinto crash test at 21 miles per hour caused the fuel neck to be torn from the gas tank and the tank to be punctured by a bolt head on the differential housing. In at least one test, spilled fuel entered the driver compartment through gaps resulting from the separation of the seams joining the rear wheel wells to the floor pan.

Subsequent tests on modified or reinforced mechanical Pinto prototypes proved safe at speeds where the Pinto failed. These modifications included installation of a rubber fuel cell, moving the tank from behind the axle to above the rear axle and reinforcing bars to strengthen the rear axle.

Ford Executives Were Aware of Pinto Design Problems But Declined To Take Action

The Pinto crash tests results had been forwarded up the chain of command to the ultimate decision-makers and were known to the Ford officials who decided to go ahead with production. A former Ford engineer and executive in charge of the crash testing program, testified that the highest level of Ford's management made the decision to go forward with the production of the Pinto, knowing that the gas tank was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire and knowing that "fixes" were possible at nominal cost. He testified that management's decision was based on the cost savings which would inure from omitting or delaying the "fixes".

Ford Could Have Fixed the Problem
With Inexpensive Design Changes

Design changes that would have enhanced the integrity of the fuel tank system at relatively little cost per car included the following:

Frame reinforcement - Side members $2.40
Cross members $1.80

Shock absorbant "flak suit" to protect tank $4.00

Placement of tank over the axle surrounded with a protective barrier $9.95

Substitution of a rear axle with a smooth differential housing $2.10

Improved bumper and additional crush space $15.30

Additional crush space and a stronger rear bumper would have made the fuel tank safe in a 34 to 38 mile per hour rear end collision. Additional measures such as a bladder within the tank were used or if the tank were protected with a shield the fuel tank would have been safe in a 40 to 45 miles per hour rear impact. If the tank had been located over the rear axle, it would have been safe in a rear impact at 50 miles per hour.

Punitive Damage Award Had
An Insignificant Impact of Fords Profits

Fords net worth was $7.7 billion and its income over $983 million. The punitive award was approximately 0.005% of Fords net worth and approximately 0.3% of its 1976 net income.

ASBESTOS

Fisher v. Johns-Manville Co. and Bell Asbestos Mines, Ltd., New Jersey Superior Court, Appl Nos. A-2430-81T2 and A-2942-81T2 Jan. 31, 1984 aff'd.

Punitive damages were recovered by a retired workman whose disabilities resulted from exposure to absestos in

his early years of employment when he handled asbestos manufactured by companies that knew the hazards and made a conscious business decision to withhold the information from the public, deliberately choosing not to give warnings to users.

Overwhelming evidence was found that Johns-Manville was aware of the relationship between asbestos and the disease known as asbestosis among workers exposed to asbestos in mining, milling and manufacturing in the early 1930s.

In awarding damages the court found that Johns-Manville responsible for deliberate acts of omission with knowledge and with a high degree of harm and reckless indifference to consequences. The victim was awarded $91,000 compensatory and $300,000 punitive.

DALKON SHIELD

Palmer v. A.H. Robins Co., P2d (colo. June 4, 1984) As a result of using the Dalkon Shield the plaintiffs having suffered a spontaneous septic abortion and loss of child caused by massive infection from use of the Dalkon Shield, necessitating a total hysterectomy to save the plaintiffs life (November 1973).

A.H. Robbins marketed the shield while knowledge of dangerous health implications. It was found that A.H. Robbins had been warned of the danger by a consultant over a year before the plaintiff's abortion of 22 similar incidents and never the less failed to warn users and their physicians of the life threatening risk. With ample evidence of breach of express and implied warranties, negligence and flagrant misconduct the jury awarded the plaintiff $600,000 in compensatory damages and $6.2 million in punitive damages. In this case punitive damages reflected the "conscientious decision of a jury to punish a wrongdoer with a penalty commensurate with the seriousness of the misconduct and the financial ability of the offender to pay and concomitantly, to deter (defendant) and other from similar misconduct in the future."

FLAMMABLE FABRICS

Gryc v. Dayton Hudson Corp., H.W. 2d (minn. Sup Ct. May 23, 1980)

A child was severely burned when her cotton pajamas were instantly ignited when she leaned over a stove to turn off a timer. The childs pajamas were made from a cotton material commercially known as "flannelette." A jury found the manufacturer liable and awarded $750,000 in compensatory damages and $1 million in punitive damages.

While the manufacturer product met then existing federal safety flammability standards the manufacturer knew of the the invalidity of the test and was aware that unreasonably dangerous fabrics passed the test. Under the test fabric is placed in a "flammability tester" and if it does not ignite after being exposed to flame for one second or it ignites but does not burn completely in 4 seconds it "passes" the test. The ignition rate of the child's flannelette was 1.4 seconds (Raymond V. Riegel Textile Corp.) so it passed the test.

DEFECTIVE TRACTOR GAS TANK

Merlin C. Stambaugh v. International Harvester Co. Illinois Appellate Court, Fifth District. No. 80-175, April 14, 1982.

A manufacturer of farm tractors was liable for both compensatory and punitive damages to a farmer who was seriously burned when he was sprayed with gasoline that had geysered or spurted from the tractor's fuel tank. Evidence showed that the fuel cap was defectively designed because the vent-hole was too small to let adequate gas pressure escape. Evidence also showed that similar occurrences had happened resulting in severe injuries to a number of farmers, and that the manufacturer had notice of them. In awarding $650,000 in compensatory damages and $15 million in punitive damages the jury determined that the manufacturer showed a conscious indifference to the safety of others. The punitive damage award was subsequently reduced to $7.5 million and again to $650,000.

UNSAFE PRODUCT PACKAGING
DRAIN CLEANER

Moore v. Jewel Tea Co., 253 N.E. 2d 636 (Ill App. 1969); affd 263 NE2d (Ill 1970)

Defective packaging of crystal drain cleaner resulted in severe injury. A 48 year old housewife suffered total blindness from the explosion of a Drano can which had a screw top. The explosion was caused by the combining of chemicals in granular drano with water. The combination results in intensive heat, converting any water to steam resulting in a rapid increase in pressure in a confined space. While fully aware of this the manufacturer used a container with a screw type top which allowed pressure to build up to explosive pressure levels. The jury awarded the victim $900,000 compensatory and $10,000 punitive award.

DIOXIN

Piatt v. Independent Petrochemical Corp. Mo., St. Louis City Circuit Court, No. 57103-F, Sept. 30, 1983.

Negligent disposal of dioxin resulted in the exposure of four persons to dioxin. Dioxin laden oil was sprayed on family run horse riding stables. The exposure resulted in severe health impacts on the family members exposed. Settlement $2.68 million.

The following is a summary as reported by the American Trial Lawyers Association (27 ATLA L. Rep. 27)

A chemical company called Northern Pharmacuetical and Chemical (presently out of business) manufactured hexachglorophine which has a byproduct of waste residue. Defendant Independent Petrochemical arranged for the disposal of this material by an uninsured waste haul trucker. The trucker picked up the waste residue from the manufacturing plant, took it to a holding tank, and mixed it with waste oil. The material from the holding tank was later spayed on dirt floors of horse arenas in order to control dust. One of the horse riding stables that was sprayed with the waste residue was run by the family of plaintiff sisters, ages 18 and 22; the other stable sprayed by the plaintiff 44-year old woman and her husband. Immediately after the stables were sprayed farm animals became sick, suffering lesions and loss of hair; ultimately 62 horses as well as many birds and other animals died.

Three years later, the Center for Disease Control discovered that the soil had been sprayed with dioxin, a toxic substance causing severe long-term health problems, including cancer and birth defects. Plaintiff sisters who played on the dirt floor of their family stable became ill and were hospitalized 8 years after the spraying with nose bleeds, headaches, and hemhorragic cystitis caused by dioxin poisoning of their immune, reproductive, central nervous, and genital urinary systems. Plaintiff 44 year old married woman suffered arthritis and severe joint pain as a result of the exposure to dioxin.

AGENT ORANGE

Michale F. Ryan et al v. Dow Chemical Co., Monsanto Co., hercules Inc., T H Agriculture and Nutrition Co., Diamond Shamrock Chemicals Co., Uniroyal Inc., and Thompson Chemicals Corp. MDL No. 381 - 79C74S Settlement Agreement.

Between 1965 and 1971, the time of heaviest troop involvement in Vietnam, more than 11.3 million gallons of Agent Orange (containing 240 pounds of dioxin) was sprayed. Exposure to Dioxin causes severe health effects including cancer and birth defects. On May 7, 1984 a $180 million settlement agreement of the class action suit was approved by the courts.

DES

In the 1950's DES was prescribed to prevent miscarriages. The drug was marketed without first performing laboratory upon mice. An estimated 3 million DES daughters have been affected. Millions of women all over the nation faced the menace of vaginal and cervical cancer because their mother took DES which at the time was prescribed to prevent miscarriages during pregnancy.

In the leading case on DES, Bichler v. Eli Lilly Co., plaintiff suffered from cancer which caused severe damage to internal reproductive organs, as a result the plaintiff can never bear children. The jury found that had proper testing been performed, the pharmaceutical companies would have learned that DES was capable of causing cancer to develop in female offspring and should not have marketed the drug. The jury awarded plaintiff $500,000.

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DES was produced and marketed by several hundred pharmaceutical firms making it difficult to impossible for victims to identify a specific manufacturer as having caused their injuries.

An estimated 1,000 individual or class action product liability actions have been lodged against pharmaceutical manufactures.

INFANT FORMULA

Brown v. Syntex Labatories, Inc. U.S. District Court, W.D.Mo., No. 81-0256-CV-W8, Sept. 16, 1983.

An infant was given Neo-Mul-Soy baby formula in 1978, after Syntex, the manufacturer, had stopped adding salt to the formula. In a jury trial it was found that removal of the salt resulted in speech and memory disorders and retarded brain development in the infant. The jury verdict was $415,000 and Syntex voluntarily recalled the baby formula in the 1979.

FAILURE TO USE A CHILD PROOF CAP
DRAIN CLEANER

Carr v. Clorox Corp., Mich., Wayne County Circuit Court, No. 79-918-357 NO, Oct. 4, 1982

In 1970 a 13 month old child suffered severe internal burn injuries from the ingestion of "Liquid Plumber" drain cleaner. While it was clear to the manufacturer that Liquid Plumber is exceeding caustic, the manufacturer choose not to use a container with a child proof cap, available at the time of manufacture. The child was hospitalized continuously for almost a year and underwent surgery to reconstruct his esophagus. The child continues to require periodic hospitalization, permanent malnutrition, and scarring over his body from internal lye burns. The victim received a $1.5 million settlement.

TOXIC SHOCK

Michael L. Kehm v. Procter and Gamble Mrg. Co., U.S. Court of Appeals, Eight Circuit. No. 82-1910 Dec. 2, 1983 affmd.

The manufacturer of Rely Tampons was liable for the

wrongful death of a woman caused by from toxic shock syndrome. The jury found that Rely Tampons were defective and unreasonably dangerous because the carboxymethylcellulose material used in the tampons fostered the growth of bacterium that causes toxic shock syndrome. Furthermore the jury found that the manufacturer failed to warns users of the potential danger toxic shock syndrome from using Rely tampons. The tampon was subsequently withdrawn from the market and the family of the victim was awarded $300,000 compensatory damages.

# # #

DECEPTION AND DISTORTION: THE LAWSUIT CRISIS

Robert L. Habush
Milwaukee, Wisconsin
President-Elect, The Association
of Trial Lawyers of America

Submitted Testimony
Wausau, Wisconsin, Hearing
May 30, 1986

Just when we had finally settled in for the "insurance crisis", the insurance industry decided to change labels. Unhappy with the self-incriminating interpretations of the "insurance crisis" and the stinging rebukes by critics, the insurers decided it was time to sell the public (and lawmakers) that what the insurers really meant all the time was that all of the insurance problems were really a "lawsuit crisis" - not an "insurance crisis"!

Unbelievable? Read the following:

National Underwriter, December 21, 1984. The Insurance Information Institute launches:

> "A massive effort to market the idea that there is something wrong with the civil justice system in the United States."

William Baily of Aetna Casualty stated to The National Association of Insurance Brokers on June 10, 1986:

> "The time is right to start engaging in some serious efforts for tort reform."

The Journal of Commerce, June 18, 1985, G.E.I.C.O. Chairman, John J. Byrne stated:

> "It is right for the industry to withdraw and let the pressures for reform build in the courts and in the state legislatures."

The Journal of Commerce, on March 19, 1986, reported that the Insurance Information Institute would begin a $6.5 Million nationwide advertising campaign designed, in the Insurance Information Institute's words, to:

> "Change the widely-held perception that there is an insurance crisis, to a perception of a lawsuit crisis." (Emphasis ours)

How did the insurers' plan go awry? The critics were many - some in their own industry. Read the following:

Insurance Service Organization (I.S.O.) in, "1985 - A Critical Year", stated:

> "The property casualty industry must accept the major responsibility for its current financial condition."

Best's Review, February, 1986:

> "Trying to increase market share and generate greater premium volume to take advantage of record interest rates spawned a 'savage' price war."

The President of The American Insurance Association reminded the public that:

> "Prices today are back to 1977-1978 level when adjusted for inflation." Pittsburgh Post Gazette, November 8, 1985.

But some skeptics emerged among lawmakers:

> Congressman James Florio, New Jersey, Chairman of the House Subcommittee on Commerce, Transportation and Tourism, stated in January of 1986:
>
> "My subcommittee has not been provided with data that proves that the broad scope of the insurance crisis is attributable to run-away judges and juries."

Congressman John LaFalce, New York, in the March 25, 1986, Congressional Record, stated:

> "The insurance crisis which I investigated during the late 1970's has returned and will continue coming back unless something is done to bring effective accountability to the insurance industry."

National Insurance Consumers Organization President, J. Robert Hunter, an actuary and former Federal Insurance Administrator, was more direct:

> "What we are witnessing is a manufactured crisis intended to bloat insurers' profits and reduce victims' rights."

An unlikely skeptic, Business Week, in a March 10, 1986, editorial entitled, "Insurers Must Take Part of the Rap", stated:

> ". . . the industry charge that more litigation and large damage awards are the causes of its red ink is at best unproved."

Some besieged customers became skeptical and angry. The Editor of Aviation Consumer, in a March 1, 1986, editorial entitled, "Product Liability: Who's the Real Villain?", stated:

> "There is persuasive evidence that the insurance industry may be a bigger culprit than the legal system but has erected a facade of innocence and neatly dodged all the responsibility."

The National Association of Education of Young Children, in an April 1, 1986, press release, stated:

> "If you want to expose the sham being carried on by the insurance industry look at child care."

The Coalition for Consumer Justice (35 consumer, victim, and labor organizations) in a press release stated:

> "Through a well orchestrated public relations and lobbying campaign, the insurance industry is perpetrating a phony crisis. The insurance industry's real goal is to limit our right to hold

> wrongdoers responsible for the permanent injuries they inflict."

The number of skeptics increased:

Congressman Peter W. Rodino, New Jersey, Chairman of The House Committee on the Judiciary, in an April 14, 1986, press release, announced "stepped-up inquiry on insurance crisis to probe actual costs of insurance companies."

The Progressive presented an article called, "The Great Insurance Scam". This title was echoed in The St. Petersburg Times in an April 20, 1986, editorial entitled, "The Great Insurance Scam", which stated:

> "The push to tort reform is a cynical scheme to pin the blame on the courts for the current high costs of commercial liability insurance while allowing the insurance industry to escape blame for its own financial mismanagement."

Noted Columnist, James J. Kilpatrick, in The Washington Post, on April 30, 1986, in an article entitled, "Insurance: Self Made Crisis", stated:

> ". . . The evidence persuades me, as it persuaded an advisory commission in New York, that the insurance industry's wounds 'are largely self-inflicted'."

D & B Reports (Dunn & Bradstreet), in a March/April, 1986 article entitled, "The Insurance Crisis - Who's to Blame for High Rates?", stated:

> "As for what to do now, the most direct - and probably the best - approach has nothing to do with the litigation the insurance industry claims has caused the mess."

Business Week again hit the mark in an April 21, 1986, commentary entitled, "The Explosion in Liability Lawsuits Is Nothing But a Myth."

But the most crushing blow came from an unlikely source, the United States General Accounting Office (G.A.O.) in a statement by Johnny C. Finch, Senior Associate Director - General Government Division, before the Oversight Subcommittee of The House Ways and Means Committee, on April 28, 1986:

> 1. "Property casualty companies have used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes."

Despite this he noted that they made:

> 2. "Between $50 and $75 Billion in net gains over the last ten years."
>
> 3. "The underwriting cycle has turned and is now moving in a positive direction. Indeed the industry itself is projecting substantial net gains over the next five years. Our calculations, made from industry estimates, indicate an expected net gain before taxes of more than $90 Billion over the years 1986-1990." (Emphasis ours.)

His most searing indictment was the view that the malpractice and general liability lines (which experienced huge increases in rates in 1984) could have broken even with a 20% increase in medical malpractice and a 30% increase in product liability! (Heck of a lot less than the insurers charged in these lines!)

ATTACHMENT IV

ATTACHMENT IV

Break Even Analysis for the Medical Malpractice Line in 1984
($ in millions)

Computation of Additional Earned Premiums Needed to Break Even:		
Premiums earned	$1,707	
Net investment gains[a]	750	
Total Revenues		$2,457
Less:		
Net losses incurred	$1,913	
Expenses and dividends	868	
Total Outlays		2,781
Net income/(loss) before taxes		($323)[b]
Sales commissions on additional premiums ($323 / (1-.052) - $323)[c]		18
Additional earned premiums needed to break even before commission		$341
Percent additional earned premiums needed to break even (($341 / $1,707) x 100)		20.0%

[a]Does not include unrealized gains.

[b]Does not add due to rounding.

[c]Commissions paid on this line averaged 5.2 percent of premiums written.

Source: Statement of Johnny C. Finch, Senior Associate Director, General Government Division, before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, on Profitability of the Property/Casualty Insurance Industry, Monday, April 28, 1986.

Several studies have put the last nails in the "coffin of insurers' lies" about the "lawsuit crisis". They are:

1. The Rand Corporation's Institute for Civil Justice studies;

2. Galanter's litigation studies;

3. The National Center for State Courts' report; and

4. A critique and study of Jury Verdict Research's published "averages" on jury awards.

DISTORTIONS BY THE INSURERS, THEIR PUBLIC RELATIONS ARM - THE INSURANCE INFORMATION INSTITUTE

1. "We live in a 'sue-crazy', litigious society."

2. "The number of million-dollar awards are proliferating and commonplace and the average product liability award is now $1.8 Million and the average medical malpractice award is now $1 Million."

3. "Punitive damages are commonplace, excessive, and a problem in product liability cases."

THE MILLION-DOLLAR AWARD DISTORTION

The origin of this distortion was the citation in Forbes on "average awards" published by Jury Verdict Research, a service that reports on awards cited in the press and supplied by clerks and attorneys.

The extent of the distortion caused the Jury Verdict Research, Inc., Chairman, Philip J. Hermann, to write in a May 2, 1986, letter to The Association of Trial Lawyers of America:

"I have been greatly dismayed by the recent misrep-

resentations by some of the media involving the use of Jury Verdict Research's reports on Current Award Trends." (Emphasis ours.)

The Chairman pointed out the reasons that the often-cited "averages" for product liability and medical malpractice awards are not true averages (as did Locolio, in Law, Medicine and Health Care in June, 1985, re: the malpractice figure):

1. "Average" does not include:

a. settlements normally lower, or settlements or reductions or reversals after verdict;

b. losses by plaintiff (zero recovery) (50%+ in product liability and medical malpractice cases) are not factored in, and, in the words of Mr. Hermann, if they were "our average jury award would be substantially lower." (Emphasis ours.)

2. "That the averages cites in Current Award Trends are frequently distorted by a few large verdicts." Medians (1/2 more; 1/2 less) are much less:

-median product liability awards in 1984 - $271,000;

-median medical malpractice awards in 1984 - $270,000.

To prove how improper it is to cite Jury Verdict Research's "averages" in Current Award Trends, note that:

1. In 1982 Jury Verdict Research reported that the "average" medical malpractice verdict was $962,258; yet the Insurance Information Institute reported the average California Superior Court case award in 1982 as $257,222.

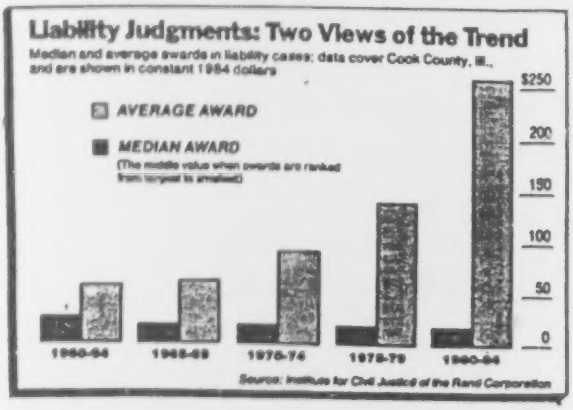
2. The Rand jury award study in Cook County and San Francisco County from 1959 to 1980 showed the averages to be:

	Cook	San Francisco
Product Liability	$275,000	$140,000
Medical Malpractice	203,000	280,000

3. Mark Peterson of the Rand Institute for Civil Justice testified on March 13, 1986, before The House Ways and Means Committee, Subcommittee on Oversight, that between 1980 and 1985 less than 4% of all cases won by plaintiffs resulted in million-dollar verdicts.

4. The median (1/2 more; 1/2 less) jury verdict has remained at approximately $8,000 in 1979 dollars since 1959; and the mean verdict went only from $30,000 to $69,000. (Rand Institute for Civil Justice, Peterson and Priest, Trends in Trial and Verdicts, 1982).

5. From 1980 to 1984 in Cook County (Chicago included) the average award, in 1984 dollars, was $250,000 with a $20,000 median. (Rand Institute for Civil Justice, Peterson and Priest, Trends in Trials and Verdicts, 1982).



Source: "Reform Insurance, Not Liability Law: Taming the Latest Insurance Crisis", The New York Times, Sunday, April 13, 1986.

6. The most devastating exposure of the distortion engaged in by the persons quoting the Jury Verdict Research "average" awards is a study of Jury Verdict Research's million-dollar awards for 1984 and 1985. Questionnaires sent to the attorneys indicated how flawed and inflated the numbers in Jury Verdict Research really are.

As Mr. Hermann, Jury Verdict Research Chairman, noted above, the Jury Verdict Research figures did not consider post verdict reductions. For instance, the $125 Million Ford Pinto verdict was included, despite the fact it had been reduced by the judge to $3.5 Million!

In the 1984-85 data, of 409 responses (out of 625 awards in 1984 and 1985*) (*incomplete):

-181 on appeal;

-228 settled.

Of the 409, the average verdict was $3.8 Million and of the 228 settled, the average amount was $1.7 Million.

This constitutes a 55% REDUCTION. In other words, the money which changed hands was 45% of the awards!

Included in the Jury Verdict Research "averages" was a $200 Million award against a convicted murder, penniless, and thus uncollectable.

Why is it important to consider what money changes hands? Because the insurers want to blame the need to raise premiums on claims paid due to these alleged mega-awards.

LITIGATION CRAZY SOCIETY
DISTORTION

Rand Corporation, Institute for Civil Justice, November 11, 1985:

> "Our research shows that juries are usually sensible and decisions have been remarkably stable over 20 years."

Business Week's Glaberson and Farrell, in "The Explosion Liability Lawsuits Is Nothing But a Myth", April 24, 1986, observe:

> "And startling new evidence suggests the 'lawsuit crisis' may not even exist."

University of Wisconsin Law Professor Marc Galanter, in his oft-cited authoritative study on litigation in America, (UCLA Law Review, October 1983) indicated Americans do not litigate any more than people in Ontario, Canada; England; Australia; Denmark; New Zealand; or Israel and sue less than Yugoslavians!

Regarding the frequently-cited increase in federal court filings, Galanter observes that part of the increase from 1977 to 1983 was due to a jump in cases filed by the federal government to reclaim over-payments of veterans' or Social Security benefits or to collect on student loans (600 to 41,000). Also, claims to restore disability payments increased during that time from 3,000 to 20,000.

Regarding the claim of large increases in product liability filings in federal courts, people fail to state that asbestos related product liability cases constituted 31% of all cases filed. (Administrative Office of the United States Courts)

The Rand study on civil jury awards in San Francisco and Cook Counties revealed the number of cases tried to a jury:

San Francisco: -290 trials per year average, early 1960's to mid-1970's
-declined for five years to low of 158 in 1978, increased to 210 in 1979.

Cook: similar trend

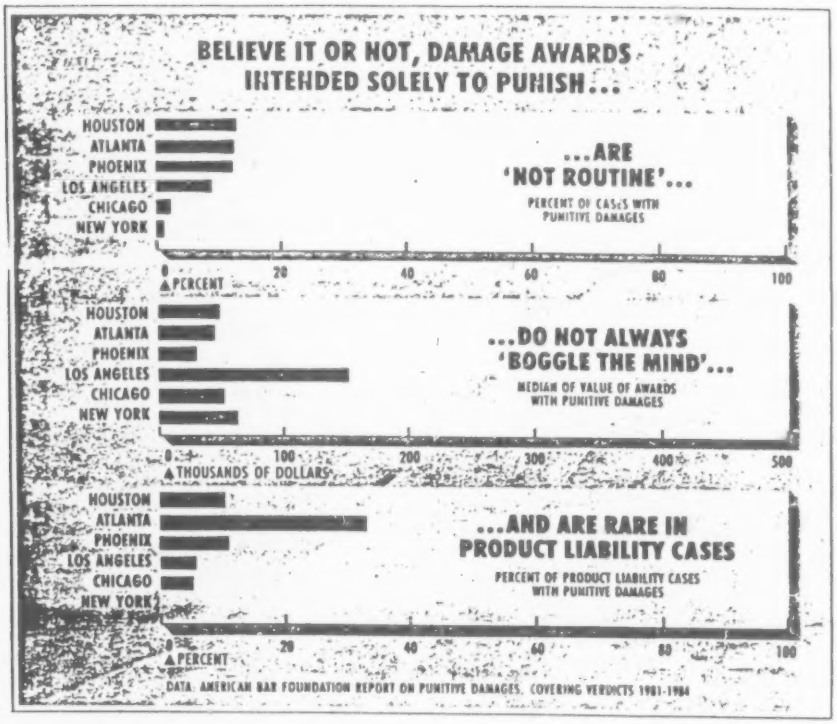
Regarding the claim that there are huge numbers of product liability and medical malpractice cases, the Rand study debunks that as well.

Between 1959 and 1979 product liability cases amounted to 4 to 10% of the trials, while medical malpractice was 6 to 8% of tried cases.

An American Bar Foundation study of civil jury verdicts in seven counties across the country revealed that product liability cases accounted for less than 5% of reported verdicts (except Los Angeles where it was 9.6%) and medical malpractice cases accounted for less than 10% of reported cases (except Los Angeles 10.9% and New York 16.1%).

Stephen Daniels, who did the American Bar Association study, states:

> "Punitive damages are not in the sites studied at least routine nor are they awarded in amounts that boggle the mind." ("Punitive Damages: Storm on the Horizon?", Daniels, February 8, 1986, American Bar Foundation.)
>
> "Predictions about ever-increasing case loads leading to the inevitable collapse of the American court system are simply spurious." (The Judges Journal, "We're Not a Litigious Society", Stephen Daniels.)



Source: "Punitive Damages: Cruel and Unusual Punishment?", Business Week, April 28, 1986.

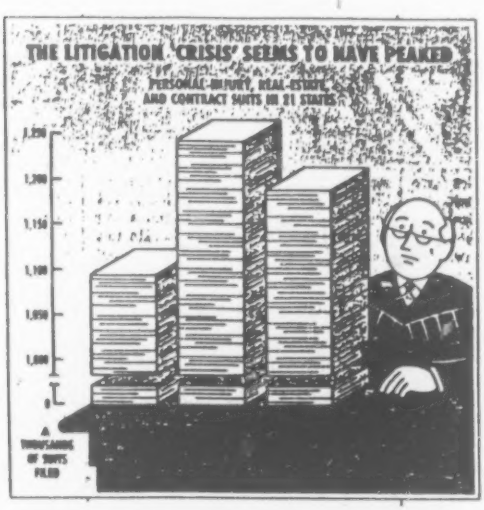
Business Week, April 28, 1986, under Legal Affairs, "Punitive Damages: Cruel and Unusual Punishment?", states:

> Believe it or not, damage awards intended solely to punish are not routine, do not always boggle the mind, and are rare in product liability cases."

As in the former section on the mega-awards, a startling study from an unexpected source recently exploded the "litigation myth".

The National Center for State Court's Chief Statistician, stated:

> "Careful examination of current available trial court data relating to tort (personal injury), contract, real property rights, and small claims cases from a representative group of state courts provides no evidence to support the existence of a national litigation explosion in state trial courts during the 1981-84 time period." (Emphasis ours.)
>
> "The often-cited litigation explosion thus appears to be exaggerated with respect to the total number of civil filings during the period of 1981-84. The source of the perception that there is a litigation explosion may be founded in a changing mix of civil cases, increased complexity of the cases being filed, and widespread media reports of enormous awards in a relatively few civil cases." (Emphasis ours.)



Source: "The Explosion in Liability Lawsuits Is Nothing But a Myth", Business Week, April 24, 1986.

Galanter
ROME LECTURE
April 9, 1986

Preliminary Version

Table 1

PERCENTAGE CHANGES IN STATE COURT FILINGS

COMPARED TO POPULATION CHANGES

	3 Year Period 1978 to 1981		3 Year Period 1981 to 1984		6 Year Period 1978 to 19844		BASE
	Population	filings	Population	filings	Population	filings	[Number of courts reporting comparable data for all 3 years]
ALL CASES	+3%	+14%	+3%	-4%	+5%	+9%	29 Courts in 20 States
SMALL CLAIMS	+2%	+18%	+2%	-6%	+4%	+11%	29 Courts in 25 States
TORTS	+4%	+2%	+4%	+7%	+8%	+9%	17 Courts in 13 States
CONTRACTS	+5%	+14%	+4%	-15%	+9%	-4%	11 Courts in 10 States

SOURCE: National Center for State Courts, Op. Cit.

Civil case filings in the period from 1981 to 1984 decreased!

> ("A Preliminary Examination of Available Civil and Criminal Trend Date in State Trial Courts 1978, 1981, and 1984", National Center for State Courts, April, 1986.)

When confronted with the truth, the distorters tried to defuse the impact of the study by claiming automobile cases affected the results, holding the increases down, but Dr. Roper stated:

> "That even if the automobile cases were omitted from the totals there did not seem to be a dramatic increase in liability lawsuits." Quote from The New York Times, May 1, 1986.

CONCLUSION

Where has the "insurance crisis" gone? Well, the supposedly "poor" insurance companies found $6 Million plus to invest in ads in the hope they can dupe the public into re-labeling the mess the insurers created the "lawsuit crisis".

The "lawsuit crisis" is a fraud! The "insurance crisis" is real!

As Congressman Rodino observed:

> "The crisis boils down to one basic problem. Liability insurance companies have totally withdrawn from some markets and they have hiked rates beyond belief in others, making liability insurance unattainable for many."
>
> "Evidence submitted to the Subcommittee shows that shortly after the insurance industry determined to launch a massive campaign to curtail individual rights through tort reform, the liability crisis occurred. The coincidence is remarkable. . ."

Hopefully others will see through the deception and place the blame squarely where it belongs - on insurers, not juries!

Capital STAMPINGS CORP 3674 N. Richards Street P.O. Box 12365 Milwaukee WI 53212
(414) 962-2764

5-23-86

Steve Loucks
c/o Senator Bob Kasten
110 Hart State Office Bldg.
Washington, DC. 20501

Dear Mr. Loucks,

In addition to what was mentioned in our recent phone conversation we feel strongly that the scope and explosion of liability lawsuits is not only hurting Corporations, Insurance Companies and individuals, but, undermining the inginuity and inventiveness of the American people on which our industrial expansion was built.

We have had several products that we have shelved because of possible exposure to lawsuit. We can design a product, and some one will use it for some use not even dreamed of by the designer. The classic example was the one where the user lifted his lawnmower up to shoulder height and tried to use it to trim the top of his hedges. He got hurt. Are we supposed to tell people this is dangerous? Is there no personal responsibility? One of the products we designed, made samples, and tested was a Clutch-Brake Assembly for power lawn mowers. This was to stop the blade within 3 seconds of leaving the handle. This specification, at that time, was the guideline set forth by the Consumer Products Safety Commission. Our product would stop the blade in under 2 seconds. We demonstrated this to many manufacturers and had a very high interest in the product. We had literature printed and proceeded to market the units. We felt it had a lot of merit as it cost the manufacturer under $3.00. Then our insurance man arrived on the scene and we told him about the unit and he told us that our insurance would go up to $180.000 to $200.000 a year if we could get someone to write it. He claimed all of the companies he representated would not touch it. We dropped the product after spending over $85,000 on development.

Since that time we have had many other products that we had to drop (three others specifically) because we felt that they led us to, too much exposure.

If the law made the user responsible for foolish actions it would be different. But, like the man who held his child over his head to see the ceiling fan and the child reached up, and got hurt in the blades. He then sued the fan maker and won. There are too many people who blame their

Continued:

foolish actions on someone else.

The thing that worries us the most is that these lawsuits are creating a generation of young people who will blame everyone else for their actions which the legal profession wallows in new found wealth.

The manufacturing segment of our economy is being devistated by foreign competition, cheap labor, while the legal profession and permissiveness of awards by the courts is tying our hands to create new products and new jobs. This two pronged attack is going to kill our manufacturing incentive. Right now, if there were a war, we don't even make nuts and bolts in this country. If we won the last one because we had an industial base, but it's now being eroded, not only by outsiders, but, by our own internal policies.

We could have tripled our employment if we could have gone ahead on these new products, instead our employment has dropped from 76 in 1978 to 42 now. Also, we are in the midst of complete automation in our plant which may drop employment even further.

We are limiting our production to making parts to other manufacturers designs and shelving all new ideas.

The incentive to grow is gone and the next choice is to close our doors. Why should the guy who takes the chance to go into business and employ people be the fall guy in the eyes of the general public, courts and government.

Very truly yours,
Capitol Stampings Corp.

R.G. Statz, President

RGS:bj

WESO
Corporation
(1-800) 423-6987

ORPORATION
25275
KEE, WI 53225
414) 352-9532

L. H. (LES) GUMM

WE ENJOY SERVING OTHERS
2900 WEST VERA AVENUE MILWAUKEE, WIS. 53209

Senator Robert W. Kasten
110 Hart Senate Office Building
Washington, D. C. 20510

Dear Bob:

I must write and comment on Product Liability Insurance.

WESO is a small company serving other small companies - lubricants and Environmental Oil Spill Sorbents. Machine shops are confused by the Environmental rules set forth by the E.P.A. The cost of getting rid of waste oils, natural shop waste, is now getting to be more than buying the virgin oils. Plus requiring a manifest that ties them to the waste for thirty years. The Liability Insurance on that act alone has soared.

Oil spill contractors have spent thousands of dollars to efficiently equip their men to service those that are unfortunate to experience a spill. Their present insurance allows them to take their equipment to the spill but does not let the men do the clean-up. The spiller has to lease the equipment and use his untrained employees to do the work. The oil spill contractor cannot get insurance to cover the actual work of cleaning up a spill.

These are only two specific accounts that will eventually produce the opposite effect of a reasonable cost of doing business and a clean invironment.

No one is asking that the insured is not to be taken care of--as evidenced by the full line of insurance a company has to have to cover injuries, health, unemployment, life, and so on.

No one is asking that the user of a product be neglected, but reasonable use should be obvious. The manufacturer, the distributor, and the seller should not have to be liable for negligence and unreasonable use of their product.

Enough said. The courts and juries are unwittingly destroying United States business by saying "The insurance will take care of it." As we can see "It won't!"

Very truly yours,
WESO CORPORATION

Lester H. Gumm
President

LG/mg

"We Enjoy Serving Others"

Flex-O-Sweep Mfg. Company, Inc.

P.O. Box 53 New Richmond, Wis. 54017 Phone: (715) 246-4276

May 30, 1986

Senator Bob Kasten
Room 110
Hart Senate Building
Washington, DC 20510

Attention: Mr. Steve Loucks

Dear Mr. Loucks,

In response to our phone conversation of last week I am relating some information on a lawsuit currently brought against us. As mentioned, we manufacture swimming pool ladders for above ground pools.

A mother and her 3 year old son were on a visit to the child's grandparents' house. The child was playing in his grandparents' fenced in backyard when he climbed over a four foot chain link fence into the next door neighbor's yard, crossed this yard, and then climbed another four foot chain link fence to reach the above ground swimming pool in the next yard.

He climbed the steps leading to the deck of the above ground swimming pool, where he fell in and drowned.

The owner of the pool originally bought it from a pool dealer along with one of our ladders. Some time later he built a deck for his pool with steps leading from the ground to the top of the deck, and removed our ladder - not needing it with his deck.

So our ladder was not even there when the accident happened. But we are being sued for failing to warn that our ladder should not be removed without replacing it with a similar ladder. The pool manufacturer, the pool dealer, and the pool owner are also being sued.

This is just another example of some of the ridiculous lawsuits that you hear about. It's no wonder that insurance rates are skyrocketing and some coverages are being cancelled. Anyone can sue anybody for just about any reason, and the chances of getting something are probably pretty good. And even if the defendant wins the case, the cost of defending can be substantial.

Sincerely,

FLEX-O-SWEEP COMPANY

Dee Davis Dee Davis

CONSULTING ENGINEERS COUNCIL OF WISCONSIN

PO Box 9553 Madison, WI 53715 608) 271-4654

REPLY TO

June 3, 1986

Senate Committee on Small Business
Attention: Tracy Crowley
SR 428-A
Washington, D.C. 20510

1985-86
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Madison, Wisconsin 53715
608/271-4854

Gentlemen:

The Consulting Engineers Council of Wisconsin would like to provide the following comments as part of the hearing record for the May 30th liability insurance field hearing, held by Senator Robert Kasten in Wausau, Wisconsin.

The Consulting Engineers Council of Wisconsin represents 57 member firms, with nearly 3,000 employees throughout our state. During a recent survey of our members, the liability insurance crisis was clearly determined to be the most serious problem facing our profession.

During the past six months, one of our members was forced to close his business because of the liability insurance problem. Another individual decided not to start a firm which had been in the planning stage.

The problem has two aspects:

1. Where insurance is available, the profession is faced with significant premium increases, accompanied by larger deductibles. The situation is becoming almost like self insurance, which is not viable for most firms.

2. Exclusionary clauses preclude the acquisition of insurance in critical areas, such as hazardous waste pollution and asbestos abatement.

Right now, only two insurance companies are offering professional errors and omissions insurance on a national basis. Not only do our member firms suffer from this situation but, the client suffers too. The client ultimately bears the increased cost of insurance, or can not find qualified firms to provide the necessary services.

Why does the problem exist? The Trial Lawyers Association would contend that the problem has been created by mismanagement in the insurance industry. However, we disagree. In our opinion, it is the civil justice system which appears to be attempting to create social reform through huge monetary awards for non-economic losses or of a punitive nature. This fact, in conjunction with the concept of contingent attorneys' fees has fueled a growth in litigation and made it practically impossible for the insurance underwriters to make reasonable actuarial assumptions on loss rates. Consequently, premium rates have increased dramatically or coverage has been dropped.

To deal with this situation, we are suggesting reform of our tort laws to restore the balance in our justice system. On the state level, we are actively participating in the "Wisconsin Coalition for Civil Justice", which is an organization of more than sixty state associations which have banded together to deal with the liability crisis.

We believe the federal court system needs similar reform. We believe that limits on awards for non-economic or physical injury such as punitive damages are necessary. So are "caps" on contingency fees by plaintiff's lawyers. Joint and several liability needs to be severely controlled and comparative negligence strictly applied.

We believe that engineers should be, and are, responsible for their errors and negligence. There are no perfect designs. But increasingly the engineer is found responsible for the negligence of others.

We believe the answer is civil justice reform!

Thank you for the opportunity to provide these comments for your hearing record.

Sincerely,

Bruce A. Weber
President

BW/lj

NATIONAL PRESTO INDUSTRIES, INC.

STATEMENT IN SUPPORT OF PRODUCT LIABILITY REFORM

National Presto Industries, Inc., a Wisconsin based manufacturer of consumer goods, notably small electric appliances, supports the concept of products liability reform. Specifically, National Presto supports the product liability reform proposals of President Ronald Reagan and Senator Robert Kasten, Jr.

National Presto supports such reform if that reform helps to ensure that consumers are protected from inferior and dangerous products and that responsible manufacturers can conduct their businesses in an environment reasonably free from the uncertainty and costs currently present in the tort system and liability insurance fields.

The crisis in liability insurance has directly affected National Presto and, in our view, is based upon the reasonable reaction of the insurance industry to the uncertainty and expense related to product liability awards. There are no reasonable standards by which product liability claims can be evaluated nor is there any uniform system which would allow a business, or its insurer to evaluate the risks involved in manufacturing or marketing a product. The inability of businesses to foresee or even understand the complex and conflicting approaches the numerous courts take to products liability claims has led to a situation where the risks associated with products has become uninsurable or only insurable at exhorbitant rates.

This insurance crisis is detrimental to U. S. manufacturers in that it raises the cost of doing business and makes some business opportunities uneconomical to pursue. Eventually, this is detrimental to the business climate in general and

has an adverse effect on the consumer, in that the consumer not only pays a higher price for goods, but must live and seek employment in an environment where business and employment opportunities have been severely restricted. In the present climate, foreign manufacturers enjoy an advantage over U. S. manufacturers in that foreign manufacturers can and have positioned themselves in such a way that they avoid financial responsibility for injuries to consumers.

National Presto supports those portions of the liability reform bill which seek a return to a fault-based liability standard for product design and warnings and returns to a standard of damages which has some reasonable relationship to an individual's loss. In addition, National Presto supports the concept of limiting punitive damages to situations where there have actually been intentional and egregious activities on the part of a manufacturer and supports the concept of a reasonable statute of repose.

National Presto remains committed to the goals of ensuring the safety of consumers in protecting the legal system that would provide injured individuals with just compensation. It is National Presto's belief that this goal can be achieved while at the same time creating an atmosphere where responsible producers of goods and services can continue to provide quality products and ensure continued employment for individuals in our country.

TO: Senator Robert W. Kasten, Jr
FROM: Glenn Handrick - Box 604 Minocqua, WI 54548
RE: Liability insurance

Dear Senator Kasten,

I wish to submit this letter as written testimony for your hearing on liability insurance to be held in Wausau, Wisconsin on May 30, 1986.

I am the owner of Lakeland Gas Service, a small bottle gas (propane) business located in Minocqua, Wisconsin. In 47 years of operation, Lakeland Gas has had ONE small claim made against it. Last year I had my liability insurance cancelled and have been unable to acquire liability insurance at any price. I have exhausted all channels including searching nationally for insurance.

In the 1970's, Lakeland Gas Service delivered 5500 one-hundred pound cylinders per year to 1700 customers. If Lakeland Gas Service is forced to cease operations because I am unable to acquire liability insurance, then the only place in the immediate area where these customers will be able to purchase these cylinders will be at Great Plains Gas Company. Great Plains is a huge, national corporation which provides its own insurance.

More important, however, than the gas we deliver, is the service work that I do on gas furnaces and other appliances. Such work is the bulk of my business. Hundreds of citizins each year depend on me to get their furnaces working again in the cold of winter or their gas refrigerators working in the summer.

Through the years Lakeland Gas has acquired a reputation for performing such services day or night any day of the week. Without liability insurance I will not be able to light a furnace for an elderly lady on a below-zero Sunday night in January. At the present time there are no other establishments which can provide this type of service. If I am forced out of business then people may have to rely on a large corporation or the public utility which may not be able to provide this quality, personal service.

Having only one claim made against Lakeland Gas in 47 years of operation would seem to indicate that it is a safe operation. If only huge corporations can acquire liability insurance, what is the small businessman to do? One thing I have heard time and time again from insurers is that coverage would be easier to acquire if there were a limit on lawsuit awards. I urge the United States Senate to pass legislation limiting awards to injured parties.

MULTITEK INC.
P.O. Box 248 • Prentice, WI 54556
Phone 715-428-2000

May 28, 1986

SENATOR ROBERT KASTEN
FEDERAL BLG. RM 107
DAVID G. ANDERSON
WAUSAU, WI 54401

Dear Mr. Kasten:

I've written time and time again to various polititians about the serious problems of product liability and still with no avail.

I'm fed up with trying to run a business without insurance and the attorneys can still keep suing. The insurance companies just laugh when I ask about getting product liability insurance and they treat small businesses like they don't exist. I've operated for one year without insurance and I'm not laughing. I'm at a desperate state at whether to stay in business or not.

It's not fun when all the attorneys are in control of the product liability issue and business keeps on taking a steady beating of larger and larger losses due to the ridiculous awards!!

I've just received another deposition leading to another product liability suit from a past company that went bankrupt because of product liability. Being an officer of the Company they keep hunting me down and will not leave me alone and I'm very tired of the whole legal system

We are a manufacturer of quality equipment and try and design the best safeguard in all our equipment but in this day and age anything you do still isn't enough. When is somebody going to HELP!!!

MULTITEK INC.

Dale W. HEikkinen
DWH/kmb

National Presto Industries, Inc.
Eau Claire, Wisconsin 54703

JOSEPH H. BERNEY
President

May 29, 1986

Dear Senator Kasten:

On behalf of National Presto Industries, Inc. I am submitting the attached statement of position urging the United States Senate to formulate and pass meaningful product liability reform legislation at the earliest possible date. A representative of our company will be appearing at the hearing in Wausau, Wisconsin, on May 30, 1986, to personally present our position on this topic.

We very much appreciate being provided with the opportunity to make known our views and comments on this topic which is of critical importance to our country. It is our hope that we can look forward to early congressional enactment of product liability reform legislation.

Sincerely,

The Honorable Robert J. Kasten, Jr
United States Senate
110 Senate Hart Office Building
Washington, D.C. 20510